No. 89-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,
Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

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March 29, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. In a state court adoption proceeding involving the voluntary termination of parental rights to an Indian child, can the Indian tribe's jurisdictional and other rights guaranteed in the Indian Child Welfare Act (25 U.S.C. §§ 1901-1961) and confirmed in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989), be evaded by the simple device of never notifying the tribe of the existence of the proceeding?

2. Does a state court's failure to provide notice to an Indian child's tribe, prior to the termination of parental rights to that child and its adoption into a non-Indian home, violate the tribe's rights of due process under the Fourteenth Amendment to the United States Constitution by denying it the opportunity to protect the interests of the tribe in the welfare of its children, as confirmed in *Mississippi Choctaw Band of Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989)?

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The Cook Inlet Tribal Council, and C.A.A. and C.M.F., an Indian mother and her minor child, petition this Court for a writ of certiorari to review the judgment of the Alaska Supreme Court in *Catholic Social Services, Inc., C.G. and S.G. v. C.A.A. and Cook Inlet Tribal Council*, Case No. S-2879, Op. No. 3534, (Alaska Supreme Court, December 8, 1989).

OPINIONS BELOW

The opinion of the Alaska Supreme Court (Pet. App. at 1a-9a) is reported at 783 P.2d 1159 (Alaska 1989). The opinion of the Alaska Superior Court for the Third Judicial District (Pet. App. at 14a-16a) is not reported.

JURISDICTION

The opinion of the Alaska Supreme Court, which constitutes its judgment, was entered on December 8, 1989. On February 27, 1990 Justice O'Connor granted petitioners' application for an extension of time and extended the time for filing this petition to and including March 29, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Sec. 1:

> No State shall * * * deprive any person of life, liberty or property, without due process of law * * *.

Indian Child Welfare Act of 1978, Secs. 2-4, 101, 103-105, and 109, 25 U.S.C. §§ 1901, 1902-1911, 1913-1915, 1919 (1988) (Pet. App. 19a-27a).

STATEMENT OF THE CASE

This case concerns the right of an Indian tribe to be notified when a private adoption agency institutes proceedings in state court for voluntary termination of a tribal mother's parental rights to her Indian child for ultimate adoption into a non-Indian home. In this petition the Indian mother, her child and her tribe join in challenging the adoption agency's and the pre-adoptive non-Indian parents' actions as contrary to the Indian Child Welfare Act and the U.S. Constitution.

A. Facts

Petitioner C.A.A. is an Athabascan Indian mother of three children and is a member of a Regional Corporation as defined in 43 U.S.C. § 1606 of the Alaska Native Claims Settlement Act. Pet. App. at 11a.[1] She is the natural

[1] The majority *per curiam* decision below does not set forth the facts. The dissenting opinion and the probate master's recommended decision on intervention (adopted by the Superior Court) both do so, and for convenience petitioners refer to the facts as set forth therein wherever possible.

mother of petitioner C.M.F., born in 1980.[2] C.M.F.'s natural father (J.M.F.) is also a Native American and a tribal member of the Aleut Community of St. Paul Island, Alaska. Petitioner Cook Inlet Tribal Council is the mother's and thus the child's tribe. For purposes of the Indian Child Welfare Act, and as determined below, C.A.A. is an "Indian," C.M.F. is her "Indian child" and the Cook Inlet Tribal Council is the "Indian child's tribe." 25 U.S.C. § 1903(3), (4)-(5); CR at 34-35, 48.[3]

Respondent Catholic Social Services ("Catholic Services") is a private religious adoption agency which offers a variety of counseling programs and is involved in arranging the adoption of minor children into families deemed by Catholic Services to be qualified. Over the years Catholic Services has been regularly involved in the adoption of Native American children. Most (if not all) of these children have been permanently placed with non-Indian families. Glaser Depo. at 12. Respondents Mr. and Mrs. G. are the non-Indian pre-adoptive family with whom C.M.F. presently resides. Pet. App. at 5a.

In July, 1985, C.A.A. first sought assistance from Catholic Services to help her address problems stemming from alcoholism. *Id.* at 3a. Shortly thereafter, she surrendered all parental rights to her eldest child, and Catholic Services placed him in a non-Indian adoptive home. Glaser Depo., Exhibit 1 at 10.

Catholic Services encouraged C.A.A. to next give up custody of her second child, petitioner C.M.F., who was

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[2] C.M.F. is represented in this matter by the State of Alaska, Office of Public Advocacy, the state agency which has been designated by the Alaska State Legislature to provide legal representation for children as counsel and or guardian ad litem in adoption, child abuse and neglect cases and in child custody proceedings. Alaska Stat. 44.21.410(a).

[3] "CR," "TR," and references to depositions are all citations to the record on appeal before the Alaska Supreme Court. CR refers to the clerk's pleadings record. TR refers to the transcript record.

then five years old. C.A.A. was reluctant to do so.[4] When in June, 1986 C.A.A. finally agreed, Catholic Services began a procedure which, as explained below, was effectively designed to keep her from being able to change her mind.

On June 30, 1986, at Catholic Services' request, the Alaska Probate Court held a relinquishment hearing to comply with section 1913 of the ICWA. At the hearing C.A.A. was told she would only have ten days to reconsider her decision (pursuant to Alaska law), despite the ICWA's provision in section 1913(c) that a mother has until the final decree to withdraw her consent. TR at 8. Among the conditions imposed by Catholic Services prior to and at the hearing was that C.A.A. retain physical custody of her daughter throughout this period. Catholic Services was clearly concerned that C.A.A. would change her mind if she had to physically give up her five-year-old child before the decree became final. CR at 71, Glaser Depo. at 83. C.A.A. thus relinquished control on paper only.[5]

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[4] In April, 1986 C.A.A. relinquished physical custody over C.M.F. to Catholic Services. Catholic Services then placed C.M.F. in a non-Indian home. In May, 1986, C.A.A. demanded her child be returned. Glaser Depo., Exh. 1 at 6-11. Catholic Services complied but thereafter provided no further social services to C.A.A. Glaser Depo. at 77; *see also* C.A.A. Depo. at 80; CR at 71. Services were not resumed until June, 1986 when C.A.A. agreed to relinquish her daughter. Glaser Depo., Exh. 1 at 12.

[5] At no time was C.A.A. ever informed that the "relinquishment" procedure, as opposed to a "consent to adoption" procedure, would leave her with no rights to determine what family would adopt her child. CR at 6-7, 71; Glaser Depo. at 154-157, 168. Under Alaska law, and as anticipated in the ICWA, 25 U.S.C. § 1913(a), (c), an adoption can be accomplished directly in one step through a "consent to adoption" procedure, Alaska Stat. 25.23.060 (1983), or it can be accomplished in a two-step relinquishment-adoption procedure which cuts off the parent's rights at the first step, long before an adoption petition is filed. Alaska Stat. 25.23.180(a) (1983). Catholic Services always uses the two-step relinquishment-adoption procedure.

Although C.A.A. advised Catholic Services she was indifferent to her family learning of the relinquishment proceedings, neither the extended Indian family nor the Cook Inlet Tribal Council were notified that the proceedings were underway. Glaser Depo. at 37-38, 165. Nor did Catholic Services inform C.A.A. of the existence of Cook Inlet Tribal Council's array of programs and support services designed to assist Indian women and mothers like C.A.A. These were standard Catholic Services practices. CR at 71.

Only on July 11, 1986, eleven days after the relinquishment hearing, was C.A.A. asked to surrender her child to Catholic Services. As she had been repeatedly told, C.A.A. then understood her child's fate was cast in stone and that, despite her second thoughts, she no longer had the right to revoke her consent. TR at 8; C.A.A. Depo. at 69. The Superior Court decree terminating C.A.A's parental rights was entered July 15, 1986. Pet. App. at 17a.

C.M.F., then five years old, was placed with the G's as a preadoptive placement. No "good cause" finding to place C.M.F. outside the ICWA's presumptive placement scheme was ever made under 25 U.S.C. § 1915(b), nor was the Cook Inlet Tribal Council or her father's tribe (the Aleut Community of St. Paul Island), ever contacted regarding tribal placement preferences under 25 U.S.C. § 1915(c).

Shortly thereafter, C.A.A. began to put her life back together. She became involved with a local church in July or August, 1986, where church members helped her cope with her drinking problem. C.A.A. Depo. at 118-119. In September she stopped drinking and began outpatient alcohol treatment. In early 1987, C.A.A. learned of the Cook Inlet Tribal Council's programs and services through a television advertisement. She contacted the tribe for counseling and for assistance in regaining custody of her daughter. Pet. App. at 4a.

In March, 1987, eight months after the preadoptive placement, the G's petitioned to adopt C.M.F. They filed their petition in the relinquishment proceeding, rather than commencing a new action.[6] C.A.A. filed a Revocation of Relinquishment. The Cook Inlet Tribal Council heard of the petition through C.A.A. and moved to intervene. The superior court granted the intervention motion on the probate master's recommendation.[7] Pet. App. at 10a-12a, 13a.

B. Proceedings Below

In July, 1987, C.A.A. filed a motion requesting that the superior court set aside the decree of termination of parental rights. CR at 37. The Cook Inlet Tribal Council filed a separate petition pursuant to 25 U.S.C. § 1914 of the ICWA to set aside the decree. CR at 78-79; Pet. App. at 5a. Both C.A.A.'s motion and the Tribal Council's petition averred, *inter alia*, that the relinquishment was invalid due to Catholic Services' failure to provide notice of the termination proceeding to the child's tribes. They maintained that the Indian Child Welfare Act provides an Indian child's tribes with a federal statutory right to notice prior to the termination of an Indian's parental rights to the child. They also maintained that the right to notice is so essential to the protection of a tribe's interests in its children that the due process clauses of the Constitution of the United States and the Constitution of the State of Alaska mandate a right to notice independent of the Indian Child Welfare Act. CR

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[6] Had they filed a separate action, the adoption petition might have entirely escaped C.A.A. and the Cook Inlet Tribal Council, since not even C.A.A. would have been a party to the new proceeding and it is clear Catholic Services had no intention of notifying them.

[7] The order permitting intervention was never appealed by respondents. The Alaska Supreme Court, however, held tribal notice of the proceedings was not required because in its opinion, tribes have no right of intervention in such proceedings.

at 57-59, 83-95, 115-127. The guardian ad litem for C.M.F. concurred. CR at 351.

In November, 1987, the probate master recommended denial of C.A.A.'s and the Tribal Council's petition to vacate the termination decree on the grounds that under the ICWA tribes have no right to notice of voluntary parental rights termination proceedings. On June 24, 1988, the superior court rejected the report and ruled that the failure to provide notice of the termination proceedings to the Tribal Council violated the ICWA, and on that basis vacated the termination decree. Pet. App. at 15a-16a. Superior Court Judge Carlson ruled:

> The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.

Pet. App. at 15a.

Respondents appealed to the Alaska Supreme Court. The appeal dealt strictly with the issue of a tribe's right to notice of a state court proceeding for the voluntary termination of parental rights to an Indian child. On December 8, 1989, a divided Alaska Supreme Court reversed the decision of the superior court. Pet. App. at 1a-9a. In a *per curiam* opinion a four-Justice majority held that tribes have no right to notice of voluntary termination proceedings involving tribal children. The majority appears to have grounded its decision on the erroneous conclusion that tribes lack any right to intervene in such proceedings, despite the plain language of 25 U.S.C. § 1911(c) and § 1903(1)(ii) of the ICWA.[8] In

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[8] The court below never cited section 1911(c). It ruled "Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings." Pet. App. at 2a.

dissent, Justice Rabinowitz concluded that the Indian Child Welfare Act provides tribes with the right to notice and the right of intervention in all termination proceedings, be they "voluntary" or "involuntary."

REASONS FOR ISSUING THE WRIT

Four reasons require the issuance of a writ of certiorari to review the decision of the Alaska Supreme Court: (1) the direct conflict with this Court's decision in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S. Ct. 1597 (1989); (2) the deprivation of the tribe's fundamental right of due process; (3) the conflict with other states' practices on the interpretation of a federal statute; and (4) the critical importance of this case to all Native American tribes both within and outside Alaska.

I. The Decision of the Alaska Supreme Court Directly Conflicts with this Court's *Mississippi Choctaw* Decision Upholding Indian Tribal Jurisdictional and Substantive Rights in Voluntary Adoption Proceedings.

Congress in the ICWA and this Court in *Mississippi Choctaw* noted the devastating effect visited upon Indian tribes, tribal families and their children by an epidemic of adoptions of Indian children into non-Indian homes, often by private adoption agencies. 25 U.S.C. §§ 1901(4) and (5); 109 S. Ct. at 1599-1601, 1606, 1608-1610. In response to this crisis, Congress and this Court recognized the essential role of Indian tribes in adoption proceedings involving tribal children, and the special role Indian tribes play in preventing their children from being lost to their communities and extended Indian families. 25 U.S.C. §§ 1901(2)-(5); 109 S. Ct. at 1600-1602, 1606, 1608-1610.

In so doing, this Court rejected a transparent effort by the Mississippi Supreme Court to evade tribal involvement in such matters by artificially manipulating an Indian infant's place of birth, and thus its domicile. Now a majority of the Alaska Supreme Court, deliberately ignor-

ing *Mississippi Choctaw*,[9] has permitted a new strategy for evading tribal rights in Indian child adoption cases: it has condoned a private agency's practice of never even notifying tribes of the existence of adoption proceedings involving tribal children, thus effectively nullifying *all* the tribal rights accorded under the ICWA. The majority opinion below is in irreconcilable conflict with the principles supporting this Court's *Mississippi Choctaw* decision.[10]

The court below rested its ruling that tribes are not entitled to notice of voluntary termination cases otherwise covered by the ICWA on the single ground that no tribal right of intervention attaches to such proceedings:

> The sole issue presented in this case is whether under the Indian Child Welfare Act an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. *Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. Compare* 25 U.S.C.A. 1912(a) with 25 U.S.C.A. 1913 (West 1983).

Pet. App. at 2a (emphasis added). Yet, the court never cited to the intervention provision of the ICWA which plainly states otherwise:

> In *any* State court proceeding for the * * * *termination of parental rights* to an Indian child, * * * the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1911(c) (emphasis added). Proceedings for the "termination of parental rights" specifically include "*any*

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[9] Although the *per curiam* decision below contains no reference to *Mississippi Choctaw*, the dissent does. The case was brought to the court's attention by Petitioners in a letter brief dated April 17, 1989, pursuant to Rule 212(c)(12) of the Alaska Rules of Appellate Procedure.

[10] Perhaps because of this fact, the majority opinion below fails to even cite, much less discuss, *Mississippi Choctaw*.

[state] court action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903(1)(ii). This Court expressly pointed to these very provisions, wholly ignored below, in support of the Mississippi Choctaw Band's intervention in an identical voluntary termination-adoption proceeding. 109 S. Ct. at 1603 n.12.[11]

The conflict between the decision below and the statute, as interpreted by this Court, could not be more patent. The statute clearly states a tribe has a right to intervene

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[11] The legislative history cited in footnote by the majority below does not support the proposition for which it is offered. Pet. App. at 2a, n.2. *See Indian Child Welfare Act of 1978: Hearings Before the Subcommittee on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. (1978) ("House Hearings"). Chief Isaac of the Mississippi Band of Choctaw Indians spoke clearly in favor of notice. *Id.* at 63. Mary Jane Fales, Director of the ARENA project, testified in part against proposals authorizing tribal courts to request transfer of state court cases involving non-reservation domiciliaries over the wishes of the Indian parents. *Id.* at 143-144. Her concerns were addressed in section 1911(b). Ms. Fales also opined that tribal notice in voluntary state adoption cases should turn on whether or not the parents are reservation domiciliaries. *Id.* Subcommittee Chairman Roncalio and Senate Select Committee for Indian Affairs counsel Peter Taylor firmly rejected the suggestion as unacceptable and the Act reflects no such provision or distinction. *Id.* at 144. Sister Mary Clare of Catholic Social Services of Alaska directed her testimony, *id.* at 85-90, to the need for confidentiality in the provisions regarding disclosure of adoption records and in placement provisions governing adoptive, foster care and preadoptive placements. Such concerns are reflected in the provisions of section 1915(c) and in section 1917. Sister Clare also urged Congress to go further, and to absolutely bar any tribal notice or any tribal or statutory involvement in placement decisions. *Id.* at 87; *see also* prepared statement of Sister Clare in the Committee's files, referred to *id.* at 87, where on page 3 of the attached exhibit Sister Clare commented that the tribe "should not be notified over the objections of the natural parents" because doing so "would be a serious breach of confidentiality." Despite Sister Clare's suggestion the ICWA contains no such parental veto provision; House Hearings at 89 (remarks of Mr. Taylor). *Compare* 25 U.S.C. § 1911(b) (parental veto over tribal court transfers).

in any termination proceeding, including a voluntary relinquishment proceeding. If, as decided below, a tribe does not have a right to notice of the proceeding and an opportunity to respond, then as the superior court and dissenting Justice Rabinowitz noted, the right to intervene in such cases, like ICWA's other tribal rights, "prove illusory" [12] and are "hollow and without practical effect." [13]

Mississippi Choctaw speaks directly to the powerful tribal interests in state court proceedings involving the adoption of tribal children by non-Native families. As noted by the Court, those tribal interests are a direct product of the devastating impact such adoptions typically have, not only on the tribal community, but most importantly on the Indian child, an impact often most painfully experienced beginning with the onset of adolescence. 109 S. Ct. 1600-1601, 1609. Through the ICWA Congress directly sought to curb such tragedies, and to address the "impact of adoptions on the tribes themselves" by providing for the direct involvement of tribes in all adoption cases involving tribal children. *Id.* at 1609.

Recognizing that occasionally Indian parents are seemingly voluntary participants in the adoption of their own children into non-Native homes, Congress recognized the Indian child's tribe has distinct and powerful interests in the child's adoption that are "on a parity with the interests of the parents." 109 S. Ct. at 1610 (*quoting In re Adoption of Halloway*, 732 P.2d 962, 969 (Utah 1986). This interest finds expression in "[t]he numerous prerogatives accorded the tribes through the ICWA's substantive provisions." 109 S. Ct. at 1609. In the ICWA these rights prevail "even in cases where the parents consented to the adoption, because of concerns going beyond the individual wishes of parents." *Id.*

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[12] Pet. App. at 9a.

[13] Pet. App. at 15a.

Within this framework, this Court firmly rejected an attempted, albeit inconvenient, "expedient" by Indian parents to dodge a tribe's interests by giving birth to their child off the reservation and thereafter seeking to voluntarily place their baby for adoption through a state court. In so acting, the Court blocked the efforts of the Indian parents and the Mississippi courts to make an end-run around the powerful tribal rights given expression in the ICWA. Yet, the device championed by Catholic Services and the G's, and condoned in the Alaska Supreme Court's majority opinion, is considerably more "expedient" than the inconvenience of travelling off a reservation to give birth, for it requires but "two pieces of paper": a parental consent form and a judge's *pro forma* certificate that the parent "fully understood" the consequences of her consent. Pet. App. at 9a. In this manner, the ICWA is "readily circumvented," *id.*, and all the tribal rights accorded therein are lost.

In *Mississippi Choctaw*, this Court detailed the full panoply of tribal rights recognized in the ICWA, and emphasized the critical importance of those rights in the context of voluntary adoptions of Indian children into non-Indian homes. The Court specifically noted the jurisdictional provisions of sections 1911(a) and 1911(b), the former confirming exclusive tribal jurisdiction over those adoption cases (like *Mississippi Choctaw*) arising in Indian country, and the latter establishing a modified *forum non conveniens* rule for other adoption cases (as in the case at bar) arising outside Indian country. 109 S. Ct. at 1609. The Court noted that the tribal intervention provision of section 1911(c) applies to state court proceedings involving the voluntary termination of parental rights to an Indian child. And the Court noted a series of other equally important rights, including the right to petition to invalidate state court action (sec. 1914), the right to alter the presumptive placement priorities applicable in state court (sec. 1915(c)), the right to obtain records (sec. 1915(e)), and the authority to con-

clude jurisdictional and other agreements with states (sec. 1919). 109 S. Ct. at 1603, n.12, 1609. All these rights give expression to the powerful interests of Indian tribes in the fate of their children.

How is a tribe to exercise its precious rights in matters involving its children if the tribe does not know a proceeding exists? How is a tribe to assert its section 1911(a) prerogative of exclusive jurisdiction over Indian country domiciliaries, and over tribal court wards, if it never learns a state court proceeding is underway? How does it go about requesting transfer under section 1911 (b) of other cases when it is unaware the case exists in the first place? How does it intervene under section 1911 (c) in a case about which it knows nothing? And how does it participate in defending, setting, or changing the preadoptive placement priorities of section 1915(c), or in participating in a "good cause" hearing to deviate from those priorities under section 1915(a) or (b), if it has no knowledge any placement is underway? Simply put, the opinion below creates a "Catch-22" in which those cases most demanding tribal intervention escape it entirely.

Notice is an integral part of the ICWA. Without notice, the whole Act unravels. Without notice, the Mississippi Choctaw Band, absent inadvertent disclosure,[14] may never learn of a case over which it, alone, may have exclusive jurisdiction. Likewise, without notice here the Cook Inlet Tribal Council is barred from counseling a tribal family through the crisis that has brought it to the brink of a five-year-old Indian child's adoption into a non-Indian home, and it is barred (if an adoption is to occur) from having any say, any voice, any opinion,

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[14] In *Mississippi Choctaw* the Band never received notice of the adoption proceedings from the mother, the court or the adoptive couple; it learned of the case inadvertently through the concerns of the biological grandmother.

over who the adoptive parents will be. The majority opinion below cuts the heart out of the ICWA, rendering its tribal rights empty and totally nullifying this Court's *Mississippi Choctaw* decision.

For the Indian child at the center of the adoption, the decision below is even more portentous. Without tribal notice a state court may go forward and, as in *Mississippi Choctaw*, issue a decree that is entirely void for lack of jurisdiction. Like a time bomb, years may pass before the defect is discovered and, with that discovery, the child is faced with the possibility of being torn away from its adoptive family and thrown into chaos.[15] Tribal notice is an inconsequential price to pay—a simple piece of paper and a twenty-five cent stamp—for the security of the child's ultimate placement.

The Alaska Supreme Court's decision both ignores and directly conflicts with *Mississippi Choctaw*. In three short paragraphs it wipes out the most critical of rights guaranteed under the ICWA and leaves state courthouse doors wide open to the continued removal of tribal children into adoptive homes, beyond the reach of tribal authorities. Review by this Court is essential to protect the Court's decree in *Mississippi Choctaw*.

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[15] The consequences for the child may be equally severe where, as here, no "good cause" hearing, sec. 1915(a), is held to place an Indian child into a non-Indian home until many months or years have passed. At this point changing the child's placement may be severely disruptive. It should be added, however, that in such circumstances state court judges typically view the short-term trauma of breaking the psychological bond which has developed between child and non-Indian family (particularly where an Indian parent has concurred) as outweighing the high potential for psychological disruption later in the child's life. Participation at the final adoptive stage, without earlier participation, is therefore often meaningless.

II. The Decision of the Alaska Supreme Court Denies Tribes Substantive Rights in the Welfare of Tribal Children Without Due Process of Law.

To deny Indian tribes notice in the face of their substantial interests in their children is to deny them their fundamental rights of due process. As this Court has noted in a somewhat different context:

> [The] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950); *see Baldwin v. Hale*, 68 U.S. (1 Wall.) 223, 233 (1864) ("Parties whose rights are to be affected are entitled to be heard; and in order to enjoy that right they must first be notified"). Procedural due process here mandates notice and an opportunity to be heard. *See Bell v. Burson*, 402 U.S. 535, 542 (1971); *Mullane*, 339 U.S. at 314-315.

Mississippi Choctaw demonstrates that the inherent and statutory interests of tribes in the adoption of tribal children are "legitimate" and sufficiently substantial to merit due process protections. *Board of Regents v. Roth*, 408 U.S. 564, 577-578 (1972). *See Mississippi Choctaw*, 109 S. Ct. at 1600-1602, 1603, n. 12, 1606, n. 18, 1608-1610; *Santosky v. Kramer*, 455 U.S. 745, 753-754 (1982); *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 27 (1981); *Fisher v. District Court*, 424 U.S. 382, 386-388 (1976); *United States v. Quiver*, 241 U.S. 602, 605-606 (1916). Surely, those interests are sufficiently powerful to require notice before state judicial proceedings occur which may substantially affect, impair or destroy those interests. *Peralta v. Heights Medical Center, Inc.*, 485 U.S. 80, ——, 108 S. Ct. 896, 900 (1988); *Boddie v. Connecticut*, 401 US. 371, 377-378 (1971). Accordingly, this Court should grant review to protect the rights of Indian tribes, as a matter of fundamental due process,

to receive notice of adoption proceedings where substantial tribal interests are at stake.

III. The Decision of the Alaska Supreme Court Directly Conflicts with Other States' Practices.

The Alaska Supreme Court's majority opinion largely leaves to chance when, if at all, a tribe will learn of a state court voluntary adoption proceeding involving a tribal child.

If the tribal mother relinquishes her parental rights to a private adoption agency or directly to the adoptive parents, no tribal notice will be given. If the tribal mother relinquishes her parental rights to the State of Alaska, the child's tribe will receive notice.[16]

If, as in *Mississippi Choctaw*, the mother is in Mississippi, again no notice would apparently be sent and, as in that case, the child's tribe would only find out by inadvertence, luck or the deliberate act of some individual close to the adoption proceeding. Yet, if the same mother finds herself in Oklahoma, North Dakota or Utah, notice apparently *would* be sent to the child's tribe. *See Duncan v. Wiley*, 657 P.2d 1212, 1214 (Okla. Ct. App. 1982); *B.R.T. v. Executive Director of the Social Service Board of North Dakota*, 391 N.W.2d 594, 595 (N.D. 1986); *In re Adoption of Halloway*, 732 P.2d 962, 963 (Utah 1986). If she resides in Washington State the child's tribe will receive notice. Wash. Rev. Code Ann. 13.34.245(3), (5); 26.33.090(2); 26.33.110(2); 26.33.240 (1) (West Supp. 1989). The same is true in Minnesota and Michigan. Minn. Stat. Ann. 257.353(2), (3) (West Supp. 1990); Mich. Court Rules 5.980(A). And in some states, as in California, it appears at least some tribes

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[16] This will change if the State elects not to continue its past practice, pursuant to its prior interpretation of federal law, of notifying tribes. Brief of the State of Alaska, Department of Health and Social Services as *Amicus Curiae* before the Alaska Supreme Court in the proceedings below.

will learn of voluntary adoption proceedings indirectly, as part of the process for verifying that a tribal Indian child is involved. *In re Junious M.*, 144 Cal. App. 3d 786, 793, 193 Cal. Rptr. 40, 43-44 (1983) *citing Dept. of the Interior Guidelines for State Courts; Indian Child Custody Proceedings*, 44 Fed. Reg. 67584, 67586 (Nov. 25, 1979); California Dept. of Social Services All County Letter No. 89-26 at 5 (Mar. 24, 1989). Other states merely repeat the language of ICWA without further elaboration on the notification procedures, leaving open the possibility that they, like Mississippi, do not notify tribes.

Clearly, the decision below conflicts with the practices of some states, and is consistent with others. The result is a chaotic lack of national uniformity. Surely Congress cannot have intended that a tribe's interests in the welfare of its tribal children would differ, that its substantive rights would vary—and essentially not even exist—depending either on the state in which the tribe is located or the state court in which the termination-adoption proceedings are initiated. Congress intended there be national uniformity in the ICWA's notice requirements, and sought to prohibit the very forum shopping which will surely follow from the Alaska Supreme Court's decision. Review by this Court is essential to reconcile the practices of the several states in the interpretation of this critical federal law and thus resolve this conflict among the states.

IV. The Decision of the Alaska Supreme Court is of Grave Importance to All Tribes Across the Nation.

This case is not confined to Native Alaskan children and Native Alaskan tribes, for no aspect of the decision below is (nor could it be) unique to Alaska. The decision rests directly on the court's interpretation below of the ICWA, nothing more. Until the issue is firmly put to rest by this Court, it thus holds the potential for substantial precedential impact on the practices of other states' public and private child placement agencies.

One California superior court judge already has ruled that a tribe with prior notice of a voluntary Indian adoption nonetheless cannot intervene in the adoption proceeding to press for enforcement of section 1915's placement priorities, a result in direct violation of *Mississippi Choctaw*. In reaching its decision, the California court relied solely upon the *per curiam* decision below. *In re the Matter of Baby Girl Argleben*, Case No. AD53227 (Cal. Sup. Ct., Orange Co., Feb. 21, 1990) (record decision). Other courts will follow. In addition to its precedential impact in other states, tribes outside Alaska will also be immediately and directly affected by application of the decision to the substantial number of Native Americans from non-Alaska tribes who reside in Alaska.

State courts traditionally hostile to tribal rights can be expected to seize upon the opinion below as a means of furthering the very cultural bias favoring well-to-do Caucasian homes which Congress expressly sought to counter in the ICWA. 109 S. Ct. at 1602. Review by this Court now is urgent to block this growing erosion of tribal rights in the futures of their tribal children.

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari be granted. In light of the patent and irreconcilable conflict between the *per curiam* decision below and this Court's decision in *Mississippi Choctaw*, and the Court's failure to consider either that case or 25 U.S.C. § 1911(c), it is also respectfully suggested that this Court act summarily to either reverse the Alaska Supreme Court decision or to vacate and remand the case for further proceedings consistent with *Mississippi Choctaw* and Section 1911(c).

Respectfully submitted,

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March 29, 1990

* Counsel of Record

APPENDIX

APPENDIX

SUPREME COURT OF ALASKA

S-2879

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Appellants,

v.

C.A.A. and COOK INLET TRIBAL COUNCIL,
Appellees.

Dec. 8, 1989

Robert B. Flint, Hartig, Rhodes, Norman, Mahoney & Edwards, Anchorage, for appellants.

Michael Gershel, Tred Eyerly, and Carol Daniel, Alaska Legal Services Corp., Sharon Gleason, Reese, Rice & Volland, Anchorage, for appellee C.A.A.

Lloyd Benton Miller, Sonosky, Chambers, Sachse & Miller, Anchorage, for appellee Cook Inlet Tribal Council.

Philip J. McCarthy, Jr., Deputy Public Advocate, Brant McGee, Public Advocate, Anchorage, for guardian ad litem.

D. Rebecca Snow, Asst. Atty. Gen., Fairbanks, Grace Berg Schaible, Atty. Gen., Juneau, for Amicus Curiae, State of Alaska, Dept. of Health and Social Services.

Before MATTHEWS, C.J., and RABINOWITZ, BURKE, COMPTON and MOORE, JJ.

OPINION

PER CURIAM.

The sole issue presented in this case is whether under the Indian Child Welfare Act [1] an Indian child's tribe is entitled to notice of a proceeding for voluntary termination of parental rights. We answer this question in the negative. Congress explicitly granted intervention rights to tribes in involuntary termination proceedings, but did not do so in voluntary termination proceedings. *Compare* 25 U.S.C.A. § 1912(a) with 25 U.S.C.A. § 1913 (West 1983).

The legislative history of the Act demonstrates that this was a considered choice by Congress. Witnesses testified on both sides of the question whether notice should be required.[2] Additionally, the Bureau of Indian Affairs interpretative guidelines confirm the correctness of our view: "The Act mandates a tribal right of notice and intervention in involuntary proceedings but not in voluntary ones." Department of the Interior, Bureau of Indian Affairs, Guidelines for State Courts; Indian Child Custody Proceedings, 44 Fed.Reg. 67584, at 67586 (1979).

The appellees' contention that due process requires tribal notice lacks merit. In enacting the Indian Child Welfare Act, Congress has both created and defined tribal rights in adoption and termination proceedings. The provisions of the Act which give tribes the right to notice of certain proceedings and not to others, define the scope of tribal rights. The Act strikes a balance between the some-

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[1] 25 U.S.C.A. §§ 1901-1963 (West 1983).

[2] *See* testimony of (1) Chief Calvin Issac, Mississippi Band of Choctaw Indians, in *Indian Child Welfare Act of 1978: Hearings Before The Subcommittee on Indian Affairs and Public Lands of the House Comm. on Interior and Insular Affairs*, 95th Cong., 2d Sess. 62-65 (1978); (2) Mary Jane Fales, North American Center on Adoption, *Id.* at 141-148; and (3) Sister Mary Clare, Catholic Social Services of Alaska, *Id.* at 80-90.

times conflicting interests of Indian parents, Indian children, and their tribes. We are unable to say that the fact that Congress stopped short of granting tribes the right to notice in voluntary termination proceedings is fundamentally unfair.

The judgment is REVERSED and this case is REMANDED for further proceedings.

RABINOWITZ, Justice, dissenting.

The Indian Child Welfare Act of 1978 (ICWA) explicitly grants tribes the right to intervene in any State court proceeding for the termination of parental rights to an Indian child. 25 U.S.C. § 1911(c). This right to intervene is fundamental to the ICWA's purpose, and confers upon tribes an implicit right to notice of any proceeding within the Act's scope. To hold otherwise is to misread the Act. I therefore dissent.

I. FACTUAL BACKGROUND.

Review of the record reveals the following compelling facts.

In August 1980 an Athabascan mother, CAA, gave birth to a child, CMF. In July 1985 CAA approached Catholic Social Services (Catholic Services) for help with alcoholism and parenting skills. CAA thereafter relinquished custody of a second child, M.[1] and in April 1986 allowed Catholic Services to place CMF in foster care. In May 1986, however, CAA elected not to relinquish her parental rights to CMF, and CMF was returned to her. In June 1986 CAA informed Catholic Services that she had decided again to "give up" CMF. CAA asked Catholic Services to remove CMF from her home "as soon as possible." CAA was drinking heavily at this time and had subjected her child to physical abuse.

[1] CAA's relinquishment of M is not on appeal.

On June 30, 1986 CAA appeared before a probate master in a voluntary relinquishment proceeding. CAA indicated that she wanted CMF to be adopted by the Caucasian couple with whom CMF now lives (Mr. and Mrs. G). At Catholic Service's request, CAA signed a Relinquishment of Parental Rights. Catholic Services did not offer CAA the alternative consent to adoption form; neither did Catholic Services explain to CAA that Catholic Services would become CMF's legal custodian once a decree terminating CAA's parental rights was entered. Finally, Catholic Services did not inform CAA of the existence of her tribal organization, the Cook Inlet Tribal Council, or her right to be represented by her own attorney. The Cook Inlet Tribal Council (CITC) received no notice of the proceedings from any source and so did not intervene.

At the June 30 relinquishment hearing, the attorney for Catholic Services misinformed CAA that upon her signature CAA had only ten days to revoke her relinquishment of parental rights.[2] CMF remained in CAA's physical custody eleven days; CAA then physically surrendered CMF to Catholic Services, under the mistaken belief that she no longer could revoke her relinquishment of parental rights. The superior court entered a final decree terminating CAA's parental rights on July 15, 1986.

Subsequently, CAA began to put her life back together. She received assistance with her drinking problem, and in September 1986 stopped drinking and began outpatient treatment. In early 1986 CAA learned of the Cook Inlet Tribal Council through a television advertisement; she contacted the tribe for counseling and for assistance in regaining custody of CMF.

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[2] CAA was in fact entitled to revoke her relinquishment for any reason prior to the entry of a final decree of termination. *See* 25 U.S.C. § 1913(c); *In the Matter of J.R.S.*, 690 P.2d 10, 14 (Alaska 1984).

On March 26, 1987, Mr. and Mrs. G petitioned to adopt CMF, filing their petition in the relinquishment proceeding rather than commencing an independent adoption action. CAA filed a Revocation of Relinquishment the same day. CITC moved to intervene in the adoption proceeding May 7, and moved to set aside the termination decree pursuant to 25 U.S.C. § 1914. CAA and CITC raised numerous grounds for setting aside the decree including Catholic Services' failure to provide notice of the termination proceedings to the child's tribe. Thereafter the superior court issued a Memorandum Order and Decision vacating CAA's relinquishment of parental rights for Catholic Services' failure to notify the Cook Inlet Tribal Council of the voluntary relinquishment proceeding. In so holding the superior court stated in part:

> The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding.

This appeal followed.

II. THE TRIBE'S RIGHT TO INTERVENTION UNDER § 1911.

In my opinion the court erroneously concludes that Congress did not grant tribes the right to intervene in voluntary termination proceedings. The text of 25 U.S.C. § 1911(c) is simply not supportive of the court's reading:

> In *any* State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at *any* point in the proceeding. (Emphasis supplied.)

Contrary to the court's apparent rationale, the tribe's right to intervene is not grounded upon a right to notice.

Rather, the tribe has a right to intervene at any point in any State proceeding regardless of the parents' consent. This right to intervene is absolute, as an instrumental part of the jurisdictional scheme "[a]t the heart of the ICWA." *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, ——, 109 S.Ct. 1597, 1601, 104 L.Ed.2d 29, (1989). To deny tribes this right in voluntary proceedings is to allow parents to defeat the Congressional scheme by usurping the tribe's equal interest in the Indian child. *Id.* —— U.S. at ——, 109 S.Ct. at 1610 ("[T]he tribe has an interest in the child which is distinct from but on a parity with the interest of the parents.") (quoting *In re Adoption of Halloway*, 732 P.2d 962, 969-70 (Utah 1986)); *see also Holyfield*, —— U.S. at ——, 109 S.Ct. at 1609 ("Congress determined to subject [placements of Indian children in non-Indian homes] to the ICWA's jurisdictional and other provisions, even in cases where the parents consented to an adoption, because of concerns going beyond the wishes of individual parents.").

III. THE TRIBE'S RIGHT TO NOTICE.

The ICWA thus confers upon tribes an unqualified right to intervene at any point in any State court termination proceeding. The ICWA does not, however, provide an unqualified tribal right to notice in every State proceeding. Rather, while § 1912(a) sets specific criteria for tribal notice in involuntary proceedings,[3] the statute is silent

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[3] 25 U.S.C. § 1912(a) provides:

> (a) *Notice; time for commencement of proceedings; additional time for preparation*
>
> In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe can-

regarding notice to tribes when the State court deems the termination proceeding voluntary. Therefore we must look to the purpose of the statute to ascertain what Congress intended. *Cf. Holyfield*, —— U.S. at ——, 109 S.Ct. at 1606 (quoting *United States v. Pelzer*, 312 U.S. 399, 403, 61 S.Ct. 659, 661, 85 L.Ed. 913 (1941)). As the purpose of the ICWA is no less than to help Indian tribes preserve their identity,[4] I conclude that a tribal right to notice is necessarily implicit in the tribe's fundamental and unqualified intervention right under § 1911(c).[5]

The court deduces a tribal no-right to notice in voluntary proceedings from testimony before a House Subcommittee. In my opinion Congress responded to concerns expressed for parental privacy through the provision of 25 U.S.C. § 1915, which contemplates tribal participation in placement proceedings responsive to the particular needs of the child.[6] § 1915(c) requires courts to follow

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not be determined, such notice shall be given to the Secretary in the like manner, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: *Provided*, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

[4] *E.g., Holyfield*, —— U.S. at ——, 109 S.Ct. at 1602 ("The ICWA thus . . . 'seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society.'") (quoting H.R.Rep. No. 95-1386, p. 23 (1978)) U.S. Code Cong. & Admin.News 1978, pp. 7530, 7545; 25 U.S.C. § 1901(3) ("there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children").

[5] *See also* 25 U.S.C. § 1911(a), (b) (detailing tribes' rights to exercise jurisdiction in custody-termination matters).

[6] 25 U.S.C. § 1915 provides in part:

(a) *Adoptive placements; preferences*

In any adoptive placement of an Indian child under State law,

tribe-set preferences, considering the preference of the Indian child or parent "[w]here appropriate," and app'ying the tribe's preferences while "giv[ing] weight" to parental requests for anonymity. § 1915 thus strikes a balance between parental anonymity and the tribe's interests by providing a mechanism by which the privacy of

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a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) *Foster care or preadoptive placements; criteria; preferences*

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) A member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) *Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences*

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

parents may be respected while the tribe's right to protect itself and its children is served. *See In the Matter of J.R.S.*, 690 P.2d 10, 14-15, 18-19 (Alaska 1984). In my view the powers given tribes by virtue of §§ 1911 and 1915 prove illusory unless the tribe is given notice of a voluntary termination proceeding.

In sum, "[i]t is in the Indian child's best interest that its relationship to the tribe be protected." *Holyfield*, —— U.S. at —— n. 24, 109 S.Ct. at 1609 n.24 (quoting *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (App.1981), *cert. denied*, 455 U.S. 1007, 102 S.Ct. 1644, 71 L.Ed.2d 875 (1982)). The court's opinion today disenfranchises the tribe and disinherits[7] the Indian child by two pieces of paper—a consent form, and a state judge's certificate that the parent "fully understood" the consequences of her consent. 25 U.S.C. § 1913(a). I would not read the ICWA to be so readily circumvented. I would affirm the superior court's ruling.[8]

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[7] I refer to the child's potential cultural, not material inheritance. *Compare Holyfield*, —— U.S. at —— n. 24, 109 S.Ct. at 1609 n. 24 ("placements in non-Indian homes deprive[ ] the child of his or her tribal and cultural heritage") (quoting Senate Rep. No. 95-597, p. 45 (1977)) *with* AS 13.11.045(1) (posture of adopted children for interstate succession).

[8] Given this analysis of §§ 1911 and 1915, I find it unnecessary to address CAA's argument that tribes have a due process right to notice of voluntary termination proceedings under both the Alaska and United States Constitutions.

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT

Case No. 3AN-86-00394P/A

In the Matter of the Adoption of
[C.M.F.],
A Minor

RECOMMENDED DECISION AND ORDER

[Filed June 29, 1987]

The Cook Inlet Tribal Council has moved to intervene in this adoption on the basis that natural mother's consent to the voluntary termination of her parental rights did not comply with the certification requirements of 15 U.S.C. 1913(a). The motion to intervene was opposed by the petitioning adoptive parents.

The following facts are undisputed:

1. On June 30, 1986, natural mother, an Alaska Native, executed a Relinquishment of Parental Rights in open court before the Probate Master.

2. On July 14, 1986, the Probate Master certified that:

> Relinquishments were presented to [C.A.A.] and read by her, and the terms and consequences fully explained in detail to her in English. [C.A.A.] fully understood the explanation in English.

3. On July 15, 1986 a Final Decree terminating Ms. [A's] parental rights was entered which stated in part:

> It further appearing that the Relinquishment was read to [C.A.A.] at said hearing, and the terms and consequences fully explained in detail to her in English and that she fully understood the explanation in English:
>
> . . .
>
> It is hereby certified that the terms and consequences of the relinquishment were fully explained in detail to [C.A.A.] in English and that the explanation was fully understood by her in that language, . . .

4. Ms. [A] is an Alaska Native and is enrolled pursuant to Section 5 of ANCSA, 43 U.S.C. 1604, to the Cook Inlet Region. Ms. [A] is therefore an "Indian" for purposes of ICWA 25 U.S.C. 1903(3). A child of an Alaska Native who is an ICWA "Indian" is an "Indian child" for ICWA purposes. *D.E.D. v State*, 704 P2d 774 (Ak. 1985).

5. In this case Cook Inlet Tribal Council is the child's Indian tribe by designation for purposes of ICWA.

CONCLUSIONS OF LAW

1. Title I, Section 104(c) of ICWA, 25 U.S.C. 1914, authorizes the intervention of the Indian child's tribe at any point in any state court proceeding involving the termination of parental rights to an Indian child. Although a decree terminating her parental rights has been entered, Ms. [A] is seeking to set aside that Decree. Since Cook Inlet Tribal Council has a right to intervene at any point in the proceedings, it has the right to intervene during the post-decree relief stage.

2. However, although labeled a Motion To Intervene, the substance of Cook Inlet Tribal Council's motion is a request that the court invalidate the voluntary relinquishment of parental rights executed by Ms. [A] on the basis that the certification process required by 25 U.S.C. 1913(a) was not followed.

3. It is clear from the record in this matter that the required certification process was followed. Ms. [A's] relinquishment of parental rights is not invalid for failure to follow the certification process.

Based upon the above, Cook Inlet Tribal Council's Motion To Intervene is granted with the Council Directors to raise any further objections to the Termination Decree within 30 days. The Council's request that Ms. [A's] Relinquishment of Parental Rights be deemed invalid for failure to follow the ICWA mandated certification process is denied.

Objections to the foregoing must be filed within ten days of service.

DATE June 29, 1987

/s/ [Illegible]
Superior Court Probate Master

IN THE SUPERIOR COURT
FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT

File No. 3AN86-394P/A

In the Matter of the Adoption of:

[C.M.F.]

ORDER APPROVING MASTER'S REPORT

The Master filed her Findings and Report in the above-captioned case on June 29, 1987, and copies thereof were mailed to counsel of record.

Objections have not been filed, pursuant to Civil Rule 53, and the time for objections has passed.

THEREFORE IT IS ORDERED that the Court approve the Findings of the Master.

DATED this 22nd day of July, 1987, at Anchorage, Alaska.

/s/ Victor D. Carlson
Superior Court Judge

IN THE SUPERIOR COURT FOR THE
STATE OF ALASKA
THIRD JUDICIAL DISTRICT

No. 3AN-86-394 P/A

In the Matter of the Relinquishment of
Parental Rights of

[C.M.F.],

and

In the Matter of the Adoption of

[C.C.G.],

Date of Birth: 8/10/80
A Minor.

MEMORANDUM OF DECISION AND ORDER

This case involves the selection of prospective adoptive parents by the mother through Catholic Social Services. On June 30, 1986 the mother executed a relinquishment of parental rights in court to the child born August 10, 1980. The child was left in the care of the mother until July 15, 1986, when the decree terminating parental rights was entered. The child was placed with the proposed adoptive parents in whose home she currently resides.

At the time of the relinquishment the mother specifically requested that her tribe not be notified and that termination of her parental rights and the placement of the child be confidential. The Catholic Social Services complied with her request and no notice was given to her tribe.

The mother and the Cook Inlet Tribal Council now object to the adoption of the child and seek the return

of the child to the mother. For purposes of this decision it is not disputed that the child is an Indian child.

The main issue before the court is the effect of the fact that the child's tribe was not notified of the termination proceeding and it is unnecessary to reach other questions.

The mother's consent to termination of her parental rights was voluntary pursuant to 25 U.S.C. § 1913.

The tribe contends that it was entitled to be notified of the pendency of the termination. The act does not specifically require notification in a voluntary termination case. The tribe bases its claim on the tribe's right to intervene "in any state court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c).

The tribe's right to intervene as provided by the statute would be hollow and without practical effect if there was not a duty imposed upon the court to ensure that the tribe, in fact, had been notified and given the opportunity to respond as is required in an involuntary termination proceeding. 25 U.S.C. § 1912(a).

Consistent with the purposes of the Indian Child Welfare Act "to protect the best interests of Indian children (removed from their families) and to promote the security of Indian tribes and families . . . and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . ." it is necessary that parents of Indian children be fettered in their right to place their children without the opportunity of their tribe to intervene and to assert its position in the matter. 25 U.S.C. §§ 1902 and 1911(c). See H.R. Rep. No. 1386, 95th Cong., 2nd Sess. 23, *reprinted* in 1978 U.S. Code Cong. & Ad. News 7530, 7546.

IT IS ORDERED that the decree terminating the mother's parental rights is set aside.

DATED at Anchorage, Alaska, this 24th day of June, 1988.

/s/ Victor D. Carlson
VICTOR D. CARLSON
Superior Court Judge

This is to certify that a copy of the above was mailed on the 24th day of June, 1988 to:

Robert B. Flint, Esq.
Lloyd B. Miller, Esq.
Sharon L. Gleason, Esq.
Philip J. McCarthy, Jr., Esq.

Ruth Willard rw
Secretary to Judge Carlson

IN THE SUPERIOR COURT
OF THE STATE OF ALASKA
THIRD JUDICIAL CIRCUIT

Case No. 3AN-86-00394-P/A

In the Matter of the Relinquishment of
Parental Rights to [C.M.F.],
A Minor.

FINAL DECREE OF TERMINATION OF PARENTAL RIGHTS

The petition of CATHOLIC SOCIAL SERVICES, INC., for a Decree of Termination of Parental Rights of [C.A.A.], came on for hearing on the 30th day of June, 1986 in Anchorage Alaska; and

It appearing that the minor child, [C.M.F.], was born on the 10th day of August, 1980, and, is now within the jurisdiction of the Court;

And it further appearing that the natural mother voluntarily signed the Relinquishment of Parental Rights at the hearing and said Relinquishment is now on file;

And it further appearing that the Relinquishment was read to [C.A.A.] at said hearing, and the terms and consequences fully explained in detail to her in English and that she fully understood the explanation in English;

And it further appearing that ten (10) days have passed since the Relinquishment was signed and that the rights of [C.A.A.] to withdraw the Relinquishment has expired; and

IT IS ORDERED, ADJUDGED AND DECREED that the petition of CATHOLIC SOCIAL SERVICES, INC.,

is granted and that the Relinquishment of Parental Rights is approved, and

IT IS HEREBY CERTIFIED that the terms and consequences of the relinquishments were fully explained in detail to [C.A.A.] in English and that the explanation was fully understood by her in that language, and

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the parental rights of [C.A.A.] to [C.M.F.] are terminated effective as of this date.

DATED at Anchorage, Alaska, this 15th day of July 1986.

s Victor D. Carlson
Superior Court Judge

7-14-86
[Illegible]

INDIAN CHILD WELFARE ACT OF 1978
(EXCERPTS)
TITLE 25, UNITED STATES CODE

Section 1901. Congressional findings

Recognizing the special relationship between the United States and the Indian tribes and their members and the Federal responsibility to Indian people, the Congress finds—

(1) that clause 3, section 8, article I of the United States Constitution provides that "The Congress shall have Power * * * To regulate Commerce * * * with Indian tribes" and, through this and other constitutional authority, Congress has plenary power over Indian affairs;

(2) that Congress, through statutes, treaties, and the general course of dealing with Indian tribes, has assumed the responsibility for the protection and preservation of Indian tribes and their resources;

(3) that there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe;

(4) that an alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies and that an alarmingly high percentage of such children are placed in non-Indian foster and adoptive homes and institutions; and

(5) that the States, exercising their recognized jurisdiction over Indian child custody proceedings through administrative and judicial bodies, have often failed to recognize the essential tribal relations of Indian people and the cultural and social standards prevailing in Indian communities and families.

Section 1902. Congressional declaration of policy

The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.

Section 1903. Definitions

For the purposes of this chapter, except as may be specifically provided otherwise, the term—

(1) "child custody proceeding" shall mean and include—

(i) "foster care placement" which shall mean any action removing an Indian child from its parent or Indian custodian for temporary placement in a foster home or institution or the home of a guardian or conservator where the parent or Indian custodian cannot have the child returned upon demand, but where parental rights have not been terminated;

(ii) "termination of parental rights" which shall mean any action resulting in the termination of the parent-child relationship;

(iii) "preadoptive placement" which shall mean the temporary placement of an Indian child in a foster home or institution after the termination of parental rights, but prior to or in lieu of adoptive placement; and

(iv) "adoptive placement" which shall mean the permanent placement of an Indian child for adoption, including any action resulting in a final decree of adoption.

Such term or terms shall not include a placement based upon an act which, if committed by an adult, would be deemed a crime or upon an award, in a divorce proceeding, of custody to one of the parents.

(2) "extended family member" shall be as defined by the law or custom of the Indian child's tribe or, in the absence of such law or custom, shall be a person who has reached the age of eighteen and who is the Indian child's grandparent, aunt or uncle, brother or sister, brother-in-law or sister-in-law, niece or nephew, first or second cousin, or stepparent;

(3) "Indian" means any person who is a member of an Indian tribe, or who is an Alaska Native and a member of a Regional Corporation as defined in section 1606 of Title 43;

(4) "Indian child" means any unmarried person who is under age eighteen and is either (a) a member of an Indian tribe or (b) is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe;

(5) "Indian child's tribe" means (a) the Indian tribe in which an Indian child is a member of or eligible for membership or (b), in the case of an Indian child who is a member of or eligible for membership in more than one tribe, the Indian tribe with which the Indian child has the more significant contacts;

(6) "Indian custodian" means any Indian person who has legal custody of an Indian child under tribal law or custom or under State law or to whom temporary physical care, custody, and control has been transferred by the parent of such child.

(7) "Indian organization" means any group, association, partnership, corporation, or other legal entity owned or controlled by Indians, or a majority of whose members are Indians;

(8) "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians recognized as eligible for the services provided to Indians by the Secretary because of their status as Indians, including any Alaska Native village as defined in section 1602(c) of Title 43;

(9) "parent" means any biological parent or parents of an Indian child or any Indian person who has lawfully adopted an Indian child, including adoptions under tribal law or custom. It does not include the unwed father where paternity has not been acknowledged or established;

(10) "reservation" means Indian country as defined in section 1151 of Title 18 and any lands, not covered under such section, title to which is either held by the United States in trust for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to a restriction by the United States against alienation;

(11) "Secretary" means the Secretary of the Interior; and

(12) "tribal court" means a court with jurisdiction over child custody proceedings and which is either a Court of Indian Offenses, a court established and operated under the code or custom of an Indian tribe, or any other administrative body of a tribe which is vested with authority over child custody proceedings.

Section 1911. Indian tribe jurisdiction over Indian child custody proceedings

(a) Exclusive jurisdiction

An Indian tribe shall have jurisdiction exclusive as to any State over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe, except where such jurisdiction is otherwise vested in the State by existing Federal law. Where an Indian child is a ward of a tribal court, the

Indian tribe shall retain exclusive jurisdiction, notwithstanding the residence or domicile of the child.

(b) Transfer of proceedings; declination by tribal court

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child not domiciled or residing within the reservation of the Indian child's tribe, the court, in the absence of good cause to the contrary, shall transfer such proceeding to the jurisdiction of the tribe, absent objection by either parent, upon the petition of either parent or the Indian custodian or the Indian child's tribe: *Provided*, That such transfer shall be subject to declination by the tribal court of such tribe.

(c) State court proceedings; intervention

In any State Court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

(d) Full faith and credit to public acts, records, and judicial proceedings of Indian tribes

The United States, every State, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

Section 1913. Parental rights, voluntary termination

(a) Consent, record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of pa-

rental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the

parent. No adoption which has been effective for at least two years may be invalidated under the provisions of this subsection unless otherwise permitted under State law.

Section 1914. Petition to court of competent jurisdiction to invalidate action upon showing of certain violations

Any Indian child who is the subject of any action for foster care placement or termination of parental rights under State law, any parent or Indian custodian from whose custody such child was removed, and the Indian child's tribe may petition any court of competent jurisdiction to invalidate such action upon a showing that such action violated any provision of sections 1911, 1912, and 1913 of this title.

Section 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the Indian child's tribe; or (3) other Indian families.

(b) Foster care or preadoptive placements; criteria; preferences

Any child accepted for foster care or preadoptive placement shall be placed in the least restrictive setting which most approximates a family and in which his special needs, if any, may be met. The child shall also be placed within reasonable proximity to his or her home, taking into account any special needs of the child. In any foster care or preadoptive placement, a preference shall be given, in the absence of good cause to the contrary, to a placement with—

(i) a member of the Indian child's extended family;

(ii) a foster home licensed, approved, or specified by the Indian child's tribe;

(iii) an Indian foster home licensed or approved by an authorized non-Indian licensing authority; or

(iv) an institution for children approved by an Indian tribe or operated by an Indian organization which has a program suitable to meet the Indian child's needs.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: *Provided*, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

(e) Record of placement; availability

A record of each such placement, under State law, of an Indian child shall be maintained by the State in which

the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Section 1919. Agreements between States and Indian tribes

(a) Subject coverage

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.

(b) Revocation; notice; actions or proceedings unaffected

Such agreement may be revoked by either party upon one hundred and eighty days' written notice to the other party. Such revocation shall not affect any action or proceeding over which a court has already assumed jurisdiction, unless the agreement provides otherwise.

No. 89-1520

In The

Supreme Court of the United States

October Term, 1989

COOK INLET TRIBAL COUNCIL,
C.A.A. and C.M.F.,
A Tribal Indian Mother
and Her Minor Child,

Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. and S.G.,

Respondents.

BRIEF OF RESPONDENTS CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G. IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Is notice to the tribe in voluntary adoptions required under the Indian Child Welfare Act?

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STATUTE INVOLVED

25 U.S.C. §§1912(a) [1a -- Appendix]

COUNTER-STATEMENT OF THE CASE

Respondents, Catholic Social Services, Inc. ("CSS") and C.G. and S.G., accept the Statement of the Case supplied by Petitioner with the following exceptions:

1. "...Most (if not all) of these [Native American] children have been permanently placed with non-indian families." Pet., p. 3. In fact, although there are placements with Indian families, the racial mix of adoptive parents cannot be determined since CSS keeps no such racial records. Glaser Depo., Vol. 2, p. 49.

2. "[CSS] encouraged C.A.A. to next give up custody of her second child . . .. C.A.A. was reluctant to do so. When in June, 1986 C.A.A. finally agreed, [CSS] began a procedure which . . . was

effectively designed to keep her from being able to change her mind." Pet., pp. 3-4. CSS discussed many options with C.A.A. The decision to relinquish was requested by her and was completely her own decision, without suggestion or coercion of any kind. Glaser Depo., Vol. 1, pp. 28-29, 55-56, 63, 67, 70, 77-78 and 92.

3. "At the hearing C.A.A. was told she would only have ten days to reconsider her decision. . ." Pet., p. 4. The ten-day reconsideration period provided by state law was explained to C.A.A. She was informed that after that time the court would sign a decree of termination and that after that decree she could not change her mind. Hearing Trans., p. 8. A motion to revoke the relinquishment on these grounds was denied by the Anchorage Superior Court on April 6, 1990.

4. "Among the conditions imposed by [CSS] prior to and at the hearing was that C.A.A. retain physical custody of her daughter throughout this period. [CSS] was clearly concerned that C.A.A. would change her mind if she had to physically give up her . . . child before the decree became final." Pet., p. 4. CSS did not have a foster home available at the time C.A.A. decided to relinquish. After discussion of the options with C.A.A., which included state foster care, it was decided to leave CMF with C.A.A., a time period which C.A.A. used as good time to be remembered with CMF. Glaser Depo., Vol. 1, pp. 82-85, 87-90.

5. "Although C.A.A. advised [CSS] she was indifferent to her family learning of the relinquishment proceedings, neither the extended Indian family nor the Cook Inlet Tribal Council were notified that the proceedings were underway." Pet., p.

5. C.A.A. specifically requested that the Tribe and family not be contacted. Glaser Depo., Vol. 1, pp. 35, 69-70, 97, 154, 157.

6. "Nor did Catholic Services inform C.A.A. of the existence of Cook Inlet Tribal Council's array of programs and support services designed to assist Indian women and mothers like C.A.A. These were standard Catholic Services practices." Pet., p. 5. C.A.A. was given many referrals, including a residential substance abuse program and AA. She knew about Cook Inlet, but did not want them to be involved. She was also advised that she could retain her own attorney (Glaser depo., Vol. 1, pp. 177-178), which CSS would pay for. Glaser Depo., Vol. 1, p. 59. The dissent in the Alaska Supreme Court mistakenly asserted that CSS did not inform C.A.A. that she could be represented by her attorney. This false

impression had been created by the Brief of Cook Inlet Tribal Council and C.A.A. Due to ill health, Justice Robinowitz was not present during oral argument when this impression was corrected.

SUMMARY OF ARGUMENT

Section 1913 of the Indian Child Welfare Act does not require notice in voluntary adoption cases. The decision of Congress to protect the privacy of Indian parents in a statute does not violate due process. Mississippi Band of Choctaw Indians does not apply.

ARGUMENT

I

ALASKA SUPREME COURT DECISION DOES NOT CONFLICT WITH MISSISSIPPI CHOCTAW DECISION

Mississippi Band of Choctaw Indians v. Holyfield, _____ U.S. _____, 109 S.Ct. 1597 (1989) was a case involving

the exclusive jurisdiction of a tribal court under 25 U.S.C. 1911 (a) over the adoption of Indian children who were held to be domiciliaries of the Tribe. The scope of the case was set out by the Court itself:

> Because of the centrality of the exclusive tribal jurisdiction provision to the overall scheme of the ICWA, as well as the conflict between this decision of the Mississippi Supreme Court and those of several other state courts, we granted plenary review.
>
> . . .
>
> The sole issue in this case is, as the Supreme Court of Mississippi recognized, whether the twins were domiciled on the reservation.

There is no dispute about jurisdiction in the instant case. There are no tribal courts and C.A.A. has never lived on a reservation. In fact, she was born in Anchorage, grew up there and in the nearby Matanuska-Susitna Valley, and

at the time she contacted Catholic Social Services was a secretary with the State of Alaska in Anchorage. There is no dispute that the State Court has jurisdiction over the proceeding. Thus, § 1911(a) has no application and Mississippi Choctaw cannot be in conflict.

ARGUMENT

II

INDIAN CHILD WELFARE ACT IS CLEAR ON NOTICE

The per curiam opinion of the Alaska Supreme Court states at the very beginning that the only issue presented is whether the Act requires notice to an Indian Tribe in the matter of a voluntary termination of parental rights. While the court commented on intervention, that issue is not in question here. The lower court granted intervention to the Tribe, a decision which was not appealed.

The relinquishment of parental rights was initiated by C.A.A. It was a voluntary proceeding taken before the Court according to 25 U.S.C. 1913, which governs the voluntary termination of parental rights to Indian children. C.A.A. had requested that no notice be given to the Tribe, a request honored by Catholic Social Services. Such notice is required in involuntary terminations by 25 U.S.C. 1912(a):

> In an involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right to intervention...(emphasis added).

Section 1913, in contrast, makes no reference whatsoever to notice to the tribe or to intervention.

The structure of these two succeeding sections makes it impossible to conclude that Congress intended to create a right to notice in § 1913. Section 1912 is explicit on the subject, right down to the language "return receipt requested"; § 1913 is absolutely silent. If Congress had intended that § 1913 proceedings should not go forward until the Indian child's tribe was notified, the Act would have made that clear.

Any argument that the right to notice can be read into § 1913 directly from § 1912 is equally strained. It is clear from their substance that § 1912 refers only to involuntary proceedings and § 1913 only to voluntary ones. Matter of J.R.S., 690 P.2d 10, 13 (Alaska 1984); D.E.D. v. State, 704 P.2d 774, 781 (Alaska 1985); Duncan v. Wiley, 657 P.2d 1212, 1213 (Okla. App. 1982). The Alaska Supreme Court correctly concluded that the Act

does not require notice to the tribe in voluntary termination proceedings. Any other conclusion strains the language of the two sections past the breaking point.

The legislative history of the Indian Child Welfare Act confirms the statutory interpretation that notice to the tribe is not required in voluntary proceedings. In the original proposed legislation, all custody proceedings were grouped into a single definition of "child placement." S. 1214, 95th Cong., 2d Sess. § 4(h) (1977); Proposed Indian Child Welfare Act: Hearing on S. 12134 before the Senate Select Committee on Indian Affairs, 95th Cong., 2d Sess. 129 (1977). The original legislation gave the tribe the right to notice and intervention in all child placements. S. 1214 at § 102(c). Subsequent testimony indicated dissatisfaction with the general term "child placement":

> Title One is also unclear in its use of the term "child placement." Child placement according to the definition in section 4(h) includes any private action under which the parental rights of the parent . . . are impaired . . .. The definition of the term child placements remains unclear and the difficulty it has caused in discussion of this bill will be multiplied in the enforcement of the bill.

Indian Child Welfare Act: Hearings on S. 12134 before the House Subcommittee on Indian Affairs and Public Lands of the Committee on Interior and Insular Affairs, 95th Cong., 2d Sess. 175 (1978) (Statement of Rich Lavis, Assistant Secretary of Indian Affairs).

Subsequently, the House Interior Committee proposed extensive amendments to the original legislation, but even the original bill proposed by the House, H.R. 12533, contained a single definition of "child custody proceeding." Only in the final bill, written subsequent to the

House hearings, were the four types of child custody proceedings named and defined. H.R. Rep. No. 95-1386, 95th Cong., 2d Sess. 19-20 (1978), reprinted in 1978 U.S. Code Cong. & Admin. News 7530, 7542.

Testimony before the House Subcommittee on Indian Affairs on the Senate bill showed a pattern of concern that a parent's voluntary decision to relinquish custody and her right to privacy in that decision should not be infringed upon. See, e.g., Indian Child Welfare Act: House Hearings on S. 1214 (P. 54-55, Testimony of Rich Lavis, Assistant Secretary of Indian Affairs, on the mother's right to privacy off the reservation; P. 63, testimony of Chief Calvin Isaac, Mississippi Band of Choctaw Indians, calling for notice to the tribe in all cases, but intervention only with the consent of the natural parents; P. 94,

testimony of Don Mitchell of RuralCAP, to the effect that confidentiality in a small Alaska Village is most likely unobtainable with or without notice; P. 143, testimony by Mary Jane Fales, from the North American Center of Adoption, arguing that it would invade the privacy of parents living off the reservation to have to notify the tribe).

Of particular relevance is the testimony of Sister Mary Clare of Alaska Catholic Social Services, objecting to those sections of the Senate bill requiring notice to the tribe in voluntary relinquishments:

> Confidentiality.
>
> The very nature of Section 102 and 103 make the personal lives of the natural parents totally open to the view of their village and family no matter what their relationship with village and family is. In most cases we are dealing with a single mother. If the girl is older and living away from her family she may not wish them to know. If she is young the

> family usually wishes to keep the matter private. Under this bill those wishes would be completely disregarded.
>
> For obvious reasons the single mother is passing through a difficult time. She must first decide whether to allow her baby to be born at all and then whether to keep it. All of this usually takes place without the presence or interest of the natural father. To expose this girl to her family and village against her will would be tragedy. Moreover if the girl decides on adoption confidentiality between her and the adoptive parents should be preserved in her interest as well as the child's.

(CR 150-151.) Sister Mary Clare also submitted a written section-by-section analysis:

> 10. Section 102(c), P. 12, lines 1-15. In a voluntary placement the tribe should not be notified over the objections of the natural parents. Such a notice would be a serious breach of confidentiality which is a vital principle in adoption work.

(CR 156,.) See also oral testimony of Sister Mary Clare, House Hearings on S. 1214, P. 85-90.

It is therefore clear that Congress was aware of the issue of notice to tribes and had it in mind when the final bill was drafted. The original bill provided for notice to the tribe and tribal right to intervention in all child placement proceedings. The final bill distinguished between voluntary and involuntary termination proceedings, and provided for notice only in the latter. These changes were made in direct response to testimonial entreaties to respect parental privacy in voluntary relinquishments. Essentially, C.A.A. and Cook Inlet Tribal Council are asking the court to substitute its judgment for that of Congress in a statutory scheme created by Congress. One of the parties to this case spoke on the bill before the House Committee twelve

years ago. The changes requested by Catholic Social Services were made. If the statute is to be changed now, it should be changed by Congress, not the courts. The requirements of the Act must be read as Congress intended.

III

ALASKA SUPREME COURT DECISION IS CONSISTENT WITH NATIONAL BIA INTERPRETATION AND THE RULINGS OF OTHER COURTS

Following enactment of the Indian Child Welfare Act, the Bureau of Indian Affairs published guidelines for state courts in Indian child custody proceedings. 44 Fed. Reg. 67584-94 (1979). While these regulations do not have binding legislative effect, they represent the interpretation of the Department of Interior and are considered instructive. 44 Fed. Reg. 67584 (1979); D.E.D v. State, 704 P.2d at 779, n. 8.

These guidelines make it clear that a parent's right to confidentiality must prevail in voluntary proceedings.

The regulations provide in part:

> B.1. Determination That Child is an Indian. (a) When a state court has reason to believe a child involved in a child custody proceeding is an Indian, the court shall seek verification of the child's status from either the Bureau of Indian Affairs or the child's tribe. In a voluntary placement proceeding where a consenting parent evidences the desire for anonymity, the court shall make its inquiry in a manner that will not cause the parent's identity to become publicly known.

The commentary accompanying this guideline explains:

> Under the Act, confidentiality is given a much higher priority in voluntary proceedings than in involuntary ones. The Act mandates a tribal right of notice and intervention in involuntary proceedings <u>but not in voluntary ones</u>. C. 25 U.S.C. § 1912 with 25 U.S.C. § 1913. For voluntary placements, however, <u>the Act specifically directs state courts to respect parental requests for confidentiality</u>. 25 U.S.S. § 1915(c). The most common voluntary placement involves a newborn infant. Confidentiality has traditionally been a high priority in such

> placements. The Act reflects that traditional approach by requiring deference to requests for anonymity in voluntary placements but not in involuntary ones. This guideline specifically provides that anonymity not be compromised in seeking verification of Indian status. If anonymity were compromised at that point, the statutory requirement that requests for anonymity be respected in applying the preferences would be meaningless. (emphasis added)

44 Fed. Reg. 67586.

In section 1915, establishment of the preference order for placement is an indication that Congress intended the exact opposite. The proviso of subsection (c) of Section 1915 states:

> . . . where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

While some state statutes and local practices may allow or require notice under state law, no court has held that notice is required under federal law. In fact, Duncan v. Wiley, 657 P.2d at 1213, cited by petitioners, specifically holds

the opposite. The Oklahoma court stated at 1213:

> The Indian Child Welfare Act of 1978 attempts to protect the rights of Indian children and to promote tribal stability by establishing minimum federal standards from removal of Indian children from the family unit. 25 U.S.C. Sec. 1902. As part of this plan, notice of pending involuntary state court proceedings must be given the parents or Indian custodian and the tribe. 25 U.S.C. Sec. 1912.
>
> The notice requirements of Sec. 1912 are mandatory in involuntary actions. The requirements do not apply to voluntary court proceedings such as the guardianship action involving the Duncan boys. Instead, the Act provides strict procedures for a parent's or Indian custodian's voluntary relinquishment of custody. (Emphasis added.)

IV

DUE PROCESS DOES NOT REQUIRE NOTICE

Congress created the Indian Child Welfare Act. Prior to the Act no rights, constitutional or otherwise, existed for tribes in adoption proceedings. These

rights have been statutorily created after extensive Congressional hearings. Congress was entitled to balance the interests of tribes versus the interests of Indian parents. Where these conflicted, Congress legitimately provided protection for Indian parents.

Congress recognized that tribal rights do not carry the same weight in voluntary proceedings that they take in involuntary proceedings. In voluntary matters, the natural parent's request for anonymity is entitled to consideration. See § 1915(c); 44 Fed. Reg. 67586, 67594. Where the natural mother has determined that it is in the best interest of both herself and her child that she relinquish her parental rights, and where a court has assured itself that her decision was made voluntarily, the mother's judgment on this difficult and highly personal issue should not be subject to review by the tribe.

Although the tribe may be able to step in with a range of social services directed to the goal of keeping the family together, the natural mother should be free to reject that route and to handle this difficult situation as she sees fit.

The master here found that there was no constitutional right to notice in this context as argued by the tribe:

> While the tribe has an interest in its members, this interest is not so fundamental as to require notice of an Indian parent's confidential voluntary relinquishment hearing. The tribe has provided no authority either directly or by analogy to support its due process argument.

(CR 208.) While the tribe has an important interest in its members generally, its interest in voluntary relinquishment proceedings is not so "fundamental" as to invoke the protections of the due process clause. This is especially true where the relationship

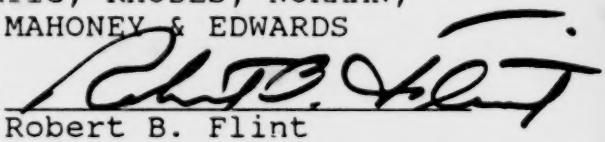
between the parent and the tribe is so attenuated that the tribe is unaware of the relinquishment without formal notice. Notice to the tribe in this case would override the substantial rights of the natural mother to privacy and confidentiality. Congress considered this problem before it enacted the Indian Child Welfare Act, and determined that the balance should be struck in favor of confidentiality in the case of voluntary proceedings. Given this Congressional determination, it would be anomalous to hold that the Act has accidentally created an interest so constitutionally "fundamental" as to require notice to the tribe.

CONCLUSION

Notice of the tribe is not required by the Indian Child Welfare Act nor the due process requirements of the Constitution. The decision of the Alaska

Supreme Court is not in conflict with Mississippi Choctaw, a jurisdiction case involving a question of domicile not present here. It is therefore respectfuly submitted that the Petition for a Writ of Certiorari be denied.

HARTIG, RHODES, NORMAN,
MAHONEY & EDWARDS

By: 
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Dated April 24, 1990

APPENDIX

APPENDIX

INDIAN CHILD WELFARE ACT OF 1978
(EXCERPT)
TITLE 25, UNITED STATES CODE

Section 1912: Pending Court Proceedings

(a) Notice; time for commencement of proceedings; additional time for preparation. In any involuntary proceeding in a State court, where the court knows or has reason to know that an Indian child is involved, the party seeking the foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe, by registered mail with return receipt requested, of the pending proceedings and of their right of intervention. If the identity or location of the parent or Indian custodian and the tribe cannot be determined, such notice

shall be given to the Secretary in like matter, who shall have fifteen days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt to provide the requisite notice to the parent or Indian custodian and the tribe. No foster care placement or termination of parental rights proceeding shall be held until at least ten days after receipt of notice by the parent or Indian custodian and the tribe or the Secretary: Provided, That the parent or Indian custodian or the tribe shall, upon request, be granted up to twenty additional days to prepare for such proceeding.

No. 89-1520

IN THE
Supreme Court of the United States
October Term, 1989

COOK INLET TRIBAL COUNCIL,
C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,
Petitioners,

V.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. and S.G.,
Respondents.

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE ALASKA SUPREME COURT

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INTEREST OF AMICUS CURIAE

The State of Alaska, Department of Health and Social Services, submits this amicus curiae brief in support of the petition for a writ of certiorari filed by the tribe, mother and child in Cook Inlet Tribal Council, C.A.A. and C.M.F. v. Catholic Social Services, Inc. C. G. & S.G., No. 89-1520.

The Department of Health and Social Services (Department) is the state agency in Alaska mandated to provide services to children and their families. AS 47.05.-010(7); AS 47.05.060. The Department's duties include a variety of adoption related responsibilities, such as taking relinquishments of parental rights, making adoptive placements, conducting placement investigations in certain cases and licensing adoption agencies. E.g., AS 25.23.-

180; AS 25.23.100(d)(e)(f); AS 25.23.200; AS 47.35.100(a)(2). Although the Department is not the exclusive adoption agency in Alaska, it arranges à significant number of adoptions each year, many of which involve Indian children, and licenses private adoption agencies. The Indian children and parents to whom it provides services, and the agencies it regulates, are therefore directly affected by the Alaska Supreme Court's holding in Catholic Social Services; Inc. v. C.A.A., 783 P.2d 1159 (Alaska 1989) that tribes have no right to notice of voluntary termination proceedings involving Indian children under the Indian Child Welfare Act (ICWA).

REASONS FOR ISSUING THE WRIT

The Alaska Supreme Court has decided this important issue of federal Indian law

in a way that conflicts with this Court's related decision in Mississippi Band of Choctaw Indians v. Holyfield, ___U.S.___, 109 S. Ct. 1597 (1989) and with other decisions. As a result, adoption can no longer represent a safe haven for Native American children in Alaska. Rather these children, who are usually too young to advocate for themselves, will be set adrift in a process that evades all the protections Congress established in ICWA. Further, it subjects these children and their adoptive families to uncertain futures rather than the stability they need, because of the prospect of having the adoption voided for a procedural defect or want of jurisdiction. It also subjects agencies like the Department, that are trying to comply with ICWA's purpose and standards, to conflicting procedural requirements based on whether

the child's tribe is in Alaska or not. Finally it creates for the Department conflicting standards for regulating the placement practices of the adoption agencies it licenses. Only this Court can compel application of a uniform standard of notice in ICWA adoptions, thus preserving the rights for children and tribes that Congress created in ICWA.

ARGUMENT

The statutory arguments regarding the conflict between the Alaska Supreme Court decision and Holyfield are well presented in petitioners' brief. The Department believes that the effect of the Alaska notice decision on Indian children and those trying to serve them also compels granting certiorari.

Congress adopted ICWA to counteract forces at work throughout the country that

undermine Indian families and deprive tribes of their posterity. 25 U.S.C. § 1901(4). Congress responded to the problem by declaring that its policy is

> to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the placement of [Indian children] in foster or adoptive homes which reflect the unique values of Indian culture....

25 U.S.C. § 1902.

This Court has acknowledged the significance of adoptions into non-Indian homes in separating Indian children from their families and tribes. Holyfield, 109 S. Ct. at 1600. These separations often have long term adverse effects on the adopted children. Id., n. 1. They also cut off the tribes' primary avenue for transmitting and thus preserving their heritage. Since the children involved are

usually too young to voice a preference or too inexperienced to foresee all the ramifications of an adoptive placement, Congress appropriately gave tribes the means to defend their interest in their children, and the children's interest in their tribes, in state court proceedings through intervention. See 25 U.S.C. § 1911(c).

ICWA addresses two areas of concern in Indian adoptions: ensuring that the parent is giving up the child knowingly and voluntarily (25 U.S.C. § 1913) and ensuring that the child is placed in a culturally appropriate home (25 U.S.C. § 1915(a)). As long as the parent is not being coerced or tricked into relinquishing, the tribe's primary concern is placement. The tribe's most significant contribution is likely to be in identifying culturally appropriate placements,

as Congress recognized by the powers it gave the tribe to vary the placement preferences and to set the standards for applying them. See 25 U.S.C. § 1915(c), (d). Even the Alaska Supreme Court has recognized that the tribe is the "placement preference system's most obvious defender" in adoptions. In re J.R.S., 690 P.2d 10, 14-15 (Alaska 1984). The Alaska Court went even further to conclude that a tribe's interest in its children's placement gave it a right to intervene in adoptions, although the court based that right on state law, not ICWA. J.R.S., 690 P.2d at 17-19, 15. 1/

1/ In J.R.S. the mother's rights had already been terminated in a child in need of aid proceeding, so the Alaska Supreme Court failed to recognize that adoptions could be an "action resulting in the termination of the parent-child relationship" in which ICWA does give the tribe the right to intervene. See, J.R.S., 690 P.2d at 12; 25 U.S.C. 1913(a)(i),(ii); 25 U.S.C. 1911(c).

The powers Congress granted tribes surely underscore its recognition of the great weight to be accorded the tribes' interest in their children's adoptions. Together with the statutorily created right to intervene when parental rights are going to be terminated (25 U.S.C. § 1911(c)), the tribe's substantial interest must give rise to minimum due process rights of notice and an opportunity to be heard. See Smith v. Organization of Foster Families, 431 U.S. 816, 839-47, 97 S. Ct. 2094, 2107-2111 (1977).

Yet even while bolstering the rights of tribes, Congress balanced them with the children's and parents' rights. For the child waiting to be adopted, two of the most critical factors for healthy transition and development are to be settled in a permanent home as quickly as possible

and to be free from changes of placement and uncertainty regarding where the child belongs. The child needs consistent nurturing from a parent figure to develop the type of parent-child relationship that will form the basis for future healthy relationships. See Beyond the Best Interests of the Child, J. Goldstein, A. Freud, A. Solnit, 17-20, 31-35 (1973). For each child's sake then, the permanent placement should be made as early as possible and should not be vulnerable to later attack on substantive and procedural grounds.

The best way to protect the child against a disruption of placements that might be required by failure to comply with ICWA's placement preferences (25 U.S.C. § 1915(a)) is to encourage early intervention by the child's tribe. Without notice of an impending adoption

being required at some point, the tribe's right to intervene is meaningless.

Requiring notice to the tribe at some stage of the proceeding certainly represents a minimum level of due process necessary to effectuate the tribe's statutory right of intervention. Requiring it when the matter first comes to court will tend to reduce harm to the child from late tribal intervention and disruption of an adoptive placement. The parent's relinquishment or consent to adoption is usually the first contact the courts have with a proposed adoption of an Indian child, thus providing the earliest formal opportunity for tribes to become involved. Prompt notice of a parent's relinquishment or consent to adoption is thus the best legal mechanism to put tribes on notice of their need to advocate

for a placement that preserves the child's tribal ties.

Not requiring notice sets up situations where there is no check on an agency's placements with non-Indian families, thus depriving the child of critical tribal or cultural ties, or where the placement is challenged well after a parent-child relationship has formed because the tribe inadvertently discovers the adoption, thus traumatizing the child and family. See Holyfield, 109 S. Ct. 1597; In re Adoption of Halloway, 732 P.2d 962 (Utah 1986). Equally significant is the fact that without notice to the tribe the child has no way of obtaining an advocate for the child's right to maintain tribal or cultural ties. Resolution of the notice issue is essential to the stability and security of adoptive families as well. The notice issue requires

the same level of uniformity attainable only from an interpretation by this Court as did the domicile question resolved in Holyfield. Otherwise, an adoption of an Indian child may be vulnerable to attack depending on what jurisdiction the family moves to. In such cases, the child again bears the primary brunt of the uncertainty and disruption that may ensue, because the child is least equipped to understand or compensate for the machinations of the adult world.

Finally, the Department faces an unacceptable dilemma in trying to enforce compliance by the agencies it licenses and regulates with ICWA's requirements and the Alaska Supreme Court's notice ruling. On the one hand the Department concurs with the Congressional findings that Indian children are usually better served by placement with extended family members or

culturally appropriate families. The Department believes this policy to be fundamental to good social work. The Department's regulations therefore set certain expectations for placement preferences which may be "superseded by state or federal law." 7 AAC 51.200(c). The tribe is often the best source for discovering such placements. All the provisions of ICWA seem to anticipate including the tribe in finding the most appropriate placement for the child. Yet the Alaska Supreme Court's decision challenged here cuts off the tribe's opportunity to participate. The predictable result is that agencies following the Alaska decision will be placing Indian children primarily in non-Indian homes. If a tribe then inadvertently discovers one of its children has been placed in a non-complying home and moves to enforce

the child's and tribe's rights, the child will again inevitably bear the brunt of the resulting delay and instability.

CONCLUSION

It is critical to Native American children needing adoptive placements, and to those trying to serve them, that this Court resolve the issue of the notice of pending adoptions due to the children's tribes. Both the children's and the tribe's rights to preserve their cultural identity will be undermined if notice to the tribe is not recognized as a uniform due process requirement under ICWA. More particularly, C.M.F., the child affected by these proceedings, should be spared extended uncertainty and delay in establishing her permanent placement by this

Court's summary reversal of the Alaska Supreme Court decision.

Respectfully submitted,

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April 27, 1990

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APPENDIX

ALASKA STATUTES

Section 25.23.100. Notice of petition, investigation and hearing.

(d) Except as provided in (g) and (i) of this section, an investigation shall be made by the department or any other qualified agency or person designated by the court to inquire into the conditions and antecedents of a minor sought to be adopted and of the petitioner for the purpose of ascertaining whether the adoptive home is a suitable home for the minor and whether the proposed adoption is in the best interest of the minor.

(e) A written report of the investigation shall be filed with the court by the investigator before the petition is heard so long as the report is filed within 30 days of the designation by the court of the department, agency or person to make the investigation.

(f) The report of the investigation shall contain an evaluation of the placement with a recommendation as to the granting of the petition for adoption and any other information the court requires regarding the petitioner or the minor.

Section 47.05.010(7). Duties of department. The Department of Health and Social Services shall

(7) cooperate with the federal government, its agencies or intrumentalities in establishing, extending and strengthening services for the protection and care of homeless,

dependent and neglected children in danger of becoming delinquent, and receive and expend funds available to the department by the federal government, the state or its political subdivisions for that purpose;

Section 47.05.060. Purpose and policy relating to children. The purpose of this title as it relates to children is to secure for each child the care and guidance, preferably in the child's own home, that will serve the moral, emotional,mental, and physical welfare of the child and the best interests of the community; to preserve and strengthen the child's family ties whenever possible, removing the child from the custody of the parents only as a last resort when the child's welfare or safety or the protection of the public cannot be adequately safeguarded without removal; and, when the child is removed from the family, to secure for the child adequate custody and care.

Section 47.10.090. Records.

(a) The court shall make and keep records of all cases brought before it. The court's official records may be inspected only with the court's permission and only by persons having a legitimate interest in them. All information and social records pertaining to a minor and prepared by an employee of the court or by a federal, state or city agency in the discharge of the employee's or agency's official duty, are privileged and may not be disclosed directly or indirectly to anyone

without the court's permission. However, a state or city law-enforcement agency shall disclose information regarding a case which is needed by the person or agency charged with making a preliminary investigation for the information of the court. Within 30 days of the date of a minor's 18th birthday or, if the court retains jurisdiction of a minor past the minor's 18th birthday, within 30 days of the date on which the court relinquishes jurisdiction over the minor, the court shall order sealed all the court's official records, information and social records pertaining to that minor, as well as records of all criminal proceedings against the minor and punishments assessed against the minor except for traffic offenses. A person may not use these sealed records for any purpose except that the court may order their use for good cause shown or may order their use by an officer of the court in making a presentencing report for the court.

(b)The name or picture of a minor under the jurisdiction of the court may not be made public in connection with the minor's status as a delinquent child or a child in need of aid unless authorized by order of the court, except that the name of a minor who is found for the second time to have violated a law, which if committed by an adult would be a felony, shall be made public unless the court, for good cause, in certain

individual cases, enters an order prohibiting the disclosure.
(c)A person who violates a provision of this section is guilty of a misdemeanor, and upon conviction is punishable by a fine of not more than $500 or by imprisonment for not more than one year, or by both.

Section 47.35.100.License required.
(a) Without a license issued by the department in accordance with its regulations a person may not operate an agency providing any of the following services:
(1) the placement of children for foster home care;
(2) the placement of children for adoption; or

25 U.S.C. § 1911.Indian tribe jurisdiction over Indian child custody proceedings

(c) State court proceedings; intervention

In any State court proceeding for the foster care placement of, or termination of parental rights to, an Indian child, the Indian custodian of the child and the Indian child's tribe shall have a right to intervene at any point in the proceeding.

25 U.S.C. § 1913.Parental rights, voluntary termination

(a) Consent; record; certification matters; invalid consents

Where any parent or Indian custodian voluntarily consents to a foster care placement or to termination of parental rights, such consent shall not be valid unless executed in writing and recorded before a judge of a court of competent jurisdiction and accompanied by the presiding judge's certificate that the terms and consequences of the consent were fully explained in detail and were fully understood by the parent or Indian custodian. The court shall also certify that either the parent or Indian custodian fully understood the explanation in English or that it was interpreted into a language that the parent or Indian custodian understood. Any consent given prior to, or within ten days after, birth of the Indian child shall not be valid.

(b) Foster care placement; withdrawal of consent

Any parent or Indian custodian may withdraw consent to a foster care placement under State law at any time and, upon such withdrawal, the child shall be returned to the parent or Indian custodian.

(c) Voluntary termination of parental rights or adoptive placement; withdrawal of consent; return of custody

In any voluntary proceeding for termination of parental rights to, or adoptive placement of, an Indian

child, the consent of the parent may be withdrawn for any reason at any time prior to the entry of a final decree of termination or adoption, as the case may be, and the child shall be returned to the parent.

(d) Collateral attack; vacation of decree and return of custody; limitations

After the entry of a final decree of adoption of an Indian child in any State court, the parent may withdraw consent thereto upon the grounds that consent was obtained through fraud or duress and may petition the court to vacate such decree. Upon a finding that such consent was obtained through fraud or duress, the court shall vacate such decree and return the child to the parent. No adoption which has been effective for at least two years may be invalidated under the provision of this subsection unless otherwise permitted under State law.

25 U.S.C. § 1915. Placement of Indian children

(a) Adoptive placements; preferences

In any adoptive placement of an Indian child under State law, a preference shall be given, in the absence of good cause to the contrary, to a placement with (1) a member of the child's extended family; (2) other members of the

Indian child's tribe; or (3) other Indian families.

(c) Tribal resolution for different order of preference; personal preference considered; anonymity in application of preferences

In the case of a placement under subsection (a) or (b) of this section, if the Indian child's tribe shall establish a different order of preference by resolution, the agency or court effecting the placement shall follow such order so long as the placement is the least restrictive setting appropriate to the particular needs of the child, as provided in subsection (b) of this section. Where appropriate, the preference of the Indian child or parent shall be considered: Provided, That where a consenting parent evidences a desire for anonymity, the court or agency shall give weight to such desire in applying the preferences.

(d) Social and cultural standards applicable

The standards to be applied in meeting the preference requirements of this section shall be the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family members maintain social and cultural ties.

No. 89-1520

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Mother and Her Minor Child,
Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,
Respondents.

On Petition for a Writ of Certiorari to the Alaska Supreme Court

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BRIEF AMICI CURIAE ON BEHALF OF FIVE AMERICAN INDIAN TRIBES IN SUPPORT OF PETITIONERS

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April 30, 1990

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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BRIEF AMICI CURIAE ON BEHALF OF FIVE AMERICAN INDIAN TRIBES IN SUPPORT OF PETITIONERS

The amici described below submit this brief because of the vital importance of this case to every tribe in the United States. We urge the Supreme Court to grant certiorari to the Supreme Court of the State of Alaska to review and correct a state court decision that erroneously interprets the plain language of the statute and this Court's precedent.

INTEREST OF AMICI CURIAE

Amicus METLAKATLA INDIAN COMMUNITY is a federally recognized Indian tribe inhabiting the Annette Islands Reservation in Alaska. This Reservation, which is the only federal Indian reservation in Alaska, was established by Congress for the Metlakatla Indians "and

such other Alaska Natives as may join them." Act of March 3, 1891, 26 Stat. 1101, 25 U.S.C. § 495. The 1987 population of the Reservation was 1,481, of whom 1,303 were members of the Community, and 47 were nonmember Indians or Alaska Natives. The Metlakatla Indian Community governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus SEMINOLE TRIBE OF FLORIDA is a federally recognized tribe which occupies federal trust lands in the Big Cypress, Hollywood and Brighton Reservations and in the Imokolee and Tampa Indian Communities in Florida. The total population of the Florida Seminole Tribe is estimated at 1,800. The Seminole Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus THREE AFFILIATED TRIBES OF THE FORT BERTHOLD RESERVATION, North Dakota, is a federally recognized tribe consisting of the Mandan, Hidatsa and Arikara Tribes of Indians. The Tribe inhabits the Fort Berthold Reservation, containing about 1,000,000 acres. The Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476. The Indian population of the Fort Berthold Reservation is approximately 3,000.

Amicus MICCOSUKEE TRIBE OF INDIANS OF FLORIDA is a federally recognized Indian tribe, which occupies lands reserved by the Secretary of the Interior within the Everglades National Park, and a federal reservation north of the Park. The total enrolled membership of the Miccosukee Tribe is estimated at 300. The Miccosukee Tribe governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to

section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

Amicus POARCH BAND OF CREEK INDIANS is a federally recognized tribe inhabiting the Poarch Band Federal Reservation in Atmore, Alabama. The total membership of the Poarch Band is 1,848. The Tribe first gained federal recognition in 1984. It governs itself under a Constitution and Bylaws approved by the Secretary of the Interior pursuant to section 16 of the Indian Reorganization Act, 25 U.S.C. § 476.

As federally recognized Indian tribes, amici file this brief in support of Petitioners because of a sincere and legitimate interest in the outcome of this case.* It involves the Indian Child Welfare Act, 25 U.S.C. §§ 1901-1963 (ICWA), an Act vitally important to the survival of all tribes, all of whose members are eligible for the protection of the Act. Congress's fundamental purpose in the Act is, whenever reasonable and possible to keep Indian children within the Indian community and to maintain Indian culture.

The issues presented are whether the ICWA requires states to notify an Indian tribe of a proceeding in state court that involves the voluntary adoption of a tribal member into a non-Indian family, and whether the tribe has a right to intervene in the proceeding. The Alaska Supreme Court, wrongfully and arbitrarily, has decided that no right of intervention exists and, therefore, no notice is required.

This interpretation would deny tribes fundamental rights guaranteed by the ICWA. The cornerstone of these rights is the right of tribes to intervene in "any" proceeding involving placements of Indian children by

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* All parties have consented in writing to the filing of this brief. Copies of these consent letters are being filed with the Clerk of this Court.

state action, including voluntary adoptions. 25 U.S.C. § 1911(c).

By removing voluntary placements from the Act's coverage, the Alaska Supreme Court destroys much of the foundation of the legislation. Just two examples illustrate the point. The court's ruling would allow parties to private adoptions to ignore, or remain ignorant of, the right of a tribe to establish orders of preference for placement of members in adoptive homes. The court's decision also would allow private adoption agencies, state courts and even Indian parents unilaterally to disfranchise children from their inherent right to their tribal heritage.

This brief is offered to assist the Court to recognize the importance of the foregoing issues. They are especially important to the Metlakatla Indian Community, an Alaska tribe bound by the Alaska decision. The issues also are of concern to the other tribes participating in this submission and to all tribes in the United States.

Because the Act has had so little Supreme Court review, state court decisions that ordinarily have little value as precedents in other states take on disproportionate significance in ICWA cases, especially when courts are seeking justification for avoiding the ICWA. One California court already has relied on this lower court's ruling to exclude a tribe from a voluntary adoption proceeding. *In re Baby Girl Argleben*, Case No. AD53227 (Cal.Sup.Ct., Orange Co., Feb. 21, 1990) (record decision). If the Alaska decision is allowed to stand, it will continue to provide unlawful support to the states' seemingly endless efforts to evade the congressional objectives so clearly stated in the Act and its legislative history.

STATEMENT OF THE CASE

The amici curiae adopt the full statement of the case presented by Petitioners. A brief summary of the facts

and proceedings is included to allow consideration of the points presented.

This case involves in Alaska Native woman, C.A.A., a member of the Cook Inlet Tribal Council (CITC) and her child, C.M.F., who is eligible for membership. For purposes of the Indian Child Welfare Act, CITC is an Indian tribe and it and its members are eligible for the protection of the Act. 25 U.S.C. § 1903(8).

The events leading up to this case were initiated by C.A.A. in 1985 when she sought assistance for her alcohol problem from Catholic Social Services (Catholic Services) in Anchorage, Alaska. Catholic Services is a private social service and adoption agency regularly involved in arranging adoptive placements for Alaska Native children in non-Native homes.

In 1986, at the urging of Catholic Services, C.A.A. "voluntarily" relinquished parental rights to C.M.F. After a relinquishment proceeding in the Alaska Probate Court, on July 15, 1986, the Alaska Superior Court entered an order terminating the parent/child relationship. No notice of any of the legal proceedings was given to the CITC. C.M.F. was placed with the G's (Respondents C.G. and S.G.), a non-Native family.

After relinquishment, C.A.A. sought assistance from her tribe to cope with her drinking. In the months that followed, through programs offered by CITC, she regained control of her life. She continued to suffer remorse for the loss of her child.

In March 1987, the G's filed a petition to adopt C.M.F. C.A.A. learned of the adoption proceeding, and in July of 1987, both she and her tribe filed petitions to set aside the decree of termination. Ground for both petitions was the lack of notice to CITC required by the ICWA.

A probate master recommended denial of the petitions based on the conclusion that the ICWA does not explicitly state that notice of voluntary proceedings must be provided to a tribe. The Alaska Superior Court refused to follow that recommendation, recognizing the right of tribes to intervene and the necessity of notice to give the right practical effect. On appeal, the Alaska Supreme Court reversed, and issued the ruling in dispute here.

SUMMARY OF ARGUMENT

This Court's Rule 10.1(c) establishes the bases for granting review in this case. First, the lower court's decision is in obvious and material conflict with this Court's recent decision in *Mississippi Band of Choctaw Indians v. Holyfield*, —— U.S. ——, 109 S.Ct. 1597 (1989) ("*Mississippi Choctaw*"). This Court's painstaking review of the history, intent and purpose of the Act in the *Mississippi Choctaw* case, and its emphatic ruling consistent therewith, should have been sufficient to put all state courts on notice of the correct standards to apply when reviewing cases under the Act. Apparently, it was not.

Second, the Indian Child Welfare Act is an important —nay, vital—federal law protecting the cultural welfare of Indian tribes and their families. The Alaska Supreme Court's narrow interpretation of the Act underscores the compelling need for this Court again to provide consistent standards for reviewing the Act and fulfilling its purposes.

ARGUMENT

I. THE LOWER COURT OPINION VIOLATES THE PREVIOUS RULING OF THIS COURT.

The issues before the Court are matters virtually decided in the *Mississippi Choctaw* case. Justice Brennan's opinion noted the essential purpose of the ICWA is to maintain the Indian family-tribal relationship. ". . . [T]he conclusion seems justified that as one state court has put it, '[t]he Act is based on the fundamental assumption that it is in the Indian child's best interest that its relationship to the tribe be protected.' [*In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 204, 635 P.2d 187, 189 (1981).]" 109 S.Ct. at 1609, n.24.

In underscoring this Court's recognition of Congress' commitment to that central purpose, Justice Brennan addressed the issue whether the "voluntary" nature of a proceeding could alter tribal rights under the Act. He held that it could not. 109 S.Ct. at 1608. He specifically listed all of the fundamental guarantees provided to tribes by the ICWA, including the right to intervene and to receive notice. 109 S.Ct. at 1609. He commented that these provisions "must . . . be seen as a means of protecting not only the interests of individual Indian children and families, but also of the tribes themselves." *Id.* He then stated as follows:

> In addition, it is clear that Congress' concern over the placement of Indian children in non-Indian homes was based in part on evidence of the detrimental impact on the children themselves of such placements outside their culture. Congress determined to subject such placements to the ICWA's jurisdictional and other provisions, *even in cases where the parents consented to an adoption*, because of concerns going beyond the wishes of individual parents.

109 S.Ct. at 1609 (emphasis added) (footnote omitted). Nothing more need be said.

II. THE RULING BELOW INCORRECTLY INTERPRETS THE INDIAN CHILD WELFARE ACT.

Putting aside the *Mississippi Choctaw* case for a moment, however, an important point to remember is that the Alaska opinion is just plain wrong. It is wrong even if this Court had not so clearly and emphatically made it so.

The ICWA is important federal legislation designed to stop the wholesale and unwarranted removal of Indian children to non-Indian homes. The epidemic of such removals has been characterized as ". . . the most tragic aspect of Indian life today." Indian Child Welfare Program, Hearings before the Subcommittee on Indian Affairs of the Senate Committee on Interior and Insular Affairs, 93d Cong., 2d Sess. 3 (1974) (Statement of William Byler) ("1974 Hearings").

The Alaska Supreme Court opinion is wrong because it states that Congress did not grant intervention rights to tribes in involuntary proceedings. The Act, however, specifies that tribes shall have the right to intervene in "*any* State court proceeding for the . . . termination of parental rights to . . . an Indian child . . . ." 25 U.S.C. § 1911(c) (emphasis added).

The opinion is wrong because it ignores the fact that the statute requires that "[i]n *any* adoptive placement of an Indian child . . ." the court must follow the placement preferences of the Act unless the child's tribe ". . . shall establish a different order of preference . . . ." 25 U.S.C. §§ 1915(a) and (c) (emphasis added). Furthermore, the Act directs state courts, in meeting the foregoing preference requirements, to apply "[t]he prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family member maintains social and cultural ties." 25 U.S.C. § 1915(d).

What should have been obvious to the Alaska court is the complete inability of a court to comply fully with any

of the foregoing provisions without involvement of, and therefore notice to, the tribe. The language is sufficiently straightforward to invoke this Court's "plain meaning" rule. *See, e.g., Tennessee Valley Authority v. Hill*, 437 U.S. 153, 173 (1978) (invoking the ordinary meaning of the plain language of the statute).

Even if the language could be deemed to paint a clouded picture, the lower court should have applied this Court's ". . . 'eminently sound and vital canon,' [citation omitted] that 'statutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians.' *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89 (1918)." *Bryan v. Itasca County*, 426 U.S. 373, 392 (1976). Correctly applying the foregoing or the "plain meaning" rule would result in the opposite of the conclusion reached by the Alaska Supreme Court.

The opinion is wrong because it is so patently out of line with the express findings of Congress, which are emblazoned across the face of the ICWA. There Congress found that ". . . an alarmingly high percentage of Indian families are broken up by the removal . . . of . . . children [who] are placed in non-Indian foster and adoptive homes . . . ." 25 U.S.C. § 1901(4). Congress further found that, in exercising jurisdiction, ". . . States . . . often failed to recognize the essential tribal relations of Indian people . . . ." 25 U.S.C. § 1901(5).

The foregoing findings provide clear guidance, in bold letters, as to how Congress wanted the ICWA construed —namely, where possible, keep Indian children in the tribal community. They certainly do not remotely encourage the result expressed by the court in Alaska.

The opinion is wrong because it ignores the dignity that must be accorded the sovereignty of Indian tribes. *See, e.g., Fisher v. District Court*, 424 U.S. 382 (1976) (*per curiam*) (as sovereign, tribe has exclusive jurisdic-

tion to determine child custody placements for members residing on reservations); *United States v. Wheeler*, 435 U.S. 313 (1978) (tribal sovereignty precludes finding of double jeopardy in separate tribal and federal criminal prosecutions).

Without citing any authority, the Alaska court created a balance between ". . . the sometimes conflicting interests of Indian parents, Indian children, and their tribes" (Pet. App. at 2a-3a) and, apparently, gave greater weight to what it (the court) considered the interests of the child. Including the tribe in a decision as profound as where an Indian child is to be raised, however, is not akin to asking a social club to join in. As sovereign governments, tribes have as much right to participate in decisions concerning the welfare of their citizens as do the states, particularly where Congress has recognized this interest and required courts to recognize it.

Furthermore, it is patently unfair to conclude that involving a tribe will always result in conflicting interests. No court has any basis to conclude that the welfare of an Indian child is better protected automatically by excluding the tribe from the proceeding. Sovereign tribes can be expected to weigh the appropriate considerations relevant to the best interests of all parties concerned in child custody cases. Indeed, nothing in the record indicates that the tribe would have objected to the termination of parental rights in this case at the time the decree was entered by the state court. The tribes' objection to the Alaska ruling is the failure of the court to give the notice required by law, not necessarily the ultimate result of the proceeding.

To the extent a conflict among a tribe, children and/or parents does exist, the ICWA gives some discretion to the state court to resolve it. In applying the placement preferences, the Act states that ". . . [w]here appropriate, the preference of the Indian child or parent shall be considered . . . ." 25 U.S.C. § 1915(c).

The foregoing does not even hint that Congress saw the conflict so apparent to the lower court. The Alaska court is merely substituting its subjective judgment of social policy for the legal policy judgment plainly expressed in the Act. By doing so, it insults the Congress, the ICWA and all Indian peoples.

The opinion is wrong because it allows the unilateral disfranchisement of Indian children from their tribal affiliation by inappropriate persons. Retention of membership in an Indian tribe is a political privilege of the individual Indian. *United States ex rel. Standing Bear v. Crook*, 25 F.Cas. 695, 699 (C.C.D. Neb. 1879) (No. 14,891). The ICWA is designed to reserve the right of Indian children to choose whether or not to exercise this privilege when they are old enough to do so intelligently. Under the Alaska court's decision, the opportunity to exercise that privilege can forever be precluded by state courts and agencies when the Indian child is a mere infant. Ironically, under the Alaska ruling, even parents who want forever to give up responsibility for providing care and comfort can waive this fundamental right on behalf of a helpless child.

Finally, the opinion is wrong as a reflection of human kindness. The legislative history of the Act records the repeated poignant story of adolescent Indian youth, adopted as infants by non-Indians, drifting in limbo between two worlds, denied by circumstances a place in either. Experts and lay persons alike chronicled this unfortunate tale, authored for the most part by state courts. *See, e.g.*, 1974 Hearings at 46; S. Rep. No. 95-597 at 43 (1977). Congress got the message, but the moral of the story did not reach the Alaska Supreme Court.

CONCLUSION

In *Mississippi Choctaw*, this Court gave unequivocal guidance to state courts on how the ICWA should be interpreted. The Alaska Supreme Court ignored it. Even without guidance, however, the Congress expressed its strong abhorrence of Indian child adoptions in the manner sanctioned by the Alaska court. The Metlakatla Indian Community, the Seminole Tribe of Florida, the Three Affiliated Tribes of the Fort Berthold Reservation, the Miccosukee Tribe of Indians of Florida and the Poarch Band of Creek Indians urge this Court to grant the Petition for a Writ of Certiorari and take the opportunity to foreclose further violations of the ICWA.

Respectfully submitted,

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April 30, 1990

No. 89-1520

In The

Supreme Court of the United States

October Term, 1989

COOK INLET TRIBAL COUNCIL, C.A.A. and C.M.F.,
A Tribal Indian Mother and Her Minor Child,

Petitioners,

v.

CATHOLIC SOCIAL SERVICES, INC., C.G. and S.G.,

Respondents.

On Petition For A Writ Of Certiorari To The
Alaska Supreme Court

MISSISSIPPI BAND OF CHOCTAW INDIANS' [redacted] BRIEF AS AMICUS CURIAE AND BRIEF OF MISSISSIPPI BAND OF CHOCTAW INDIANS, AMICUS CURIAE, IN SUPPORT OF PETITIONER

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MISSISSIPPI BAND OF CHOCTAW INDIANS' MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The Mississippi Band of Choctaw Indians moves this Court for leave to file this brief as Amicus Curiae in support of the Petitioners, Cook Inlet Tribal Council, C.A.A. and C.M.F.

The Mississippi Band of Choctaw Indians is a federally recognized tribe duly organized pursuant to Section

16 of the Indian Reorganization Act of 1934, as amended, 48 Stat 986, 25 U.S.C. § 467.

The written consent of counsel for respondents has been requested. No reply having been received, amicus hereby file this motion for leave to file brief *amicus curiae* pursuant to Rule 37.2 of the Rules of the Court. If written consent of counsel for respondents is subsequently obtained, such consent shall be filed with the Court.

There are questions of fact and law which have not been presented, nor are they likely to be adequately presented by the parties, but are relevant to the disposition of the case. The case presents issues the resolution of which is likely to have general application to all Indian tribes. The interest of amicus in this case is as follows:

1. Mississippi Band of Choctaw Indians has a continuing interest in asserting the jurisdictional principles enunciated in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), the efficacy of which may well be undermined if the decision of the Alaska Supreme Court is allowed to stand.

2. Amicus Mississippi Band of Choctaw Indians, as the prevailing party in the *Holyfield* case, regards the question of notice in consensual child custody proceedings as having been addressed and decided by this Court in a manner contrary to the ruling of the Alaska Supreme Court in this present litigation.

3. Amicus Mississippi Band of Choctaw Indians plans to address principles of preemption in Indian law, interpretation of federal statutes affecting Indian tribes, interpretation and application of

the term "notice" in federal statutes, and potential prospective applications of state adoption laws as they affect interpretation of the Indian Child Welfare Act in a manner different than those questions will be addressed by petitioner, Cook Inlet Tribal Council, et. al.

4. Differences present and prospective between adoption laws of the State of Alaska and of the State of Mississippi pose variations on the impact and the potential impact of the decision of the Alaska Supreme Court of vital importance which may not be adequately raised by petitioners.

For the foregoing reasons the Mississippi Band of Choctaw Indians hereby seek leave of the court to file the attached *Amicus Curiae* brief.

Dated this the 27 day of April, 1989.

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BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

Amicus curiae has a substantial interest in this case as a federally recognized Indian tribe with a governing body and court system. Twice in the last dozen years amicus tribe has had resort to this Court for recognition of its special federal and tribal jurisdiction free from state court incursions. See, e.g. *United States v. John*, 437 U.S. 634 (1978); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989).

The issues raised in this case threaten the efficacy of tribal court jurisdiction this Court earlier recognized in litigation of the Mississippi Band of Choctaw Indians in adoption cases involving children eligible for tribal membership. The tribal jurisdiction and tribal membership of amicus will be affected by the decision in this case.

SUMMARY OF ARGUMENT

This Court in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), blocked applications of state judicial redefinitions of the terms "residence" and "domicile" by Mississippi courts where they would otherwise defeat an ICWA provision conferring exclusive tribal court jurisdiction over reservation tribal children. Now a ruling of the Alaska Supreme Court *sub judice* would defeat the ICWA rights safeguarded by the *Holyfield* decision through its holding that an Indian child's tribe is not required to be provided notice of consensual state court terminations of parental rights and subsequent adoptions into non-Indian homes. The Alaska Supreme Court ignores the preemptive provisions of ICWA to attain a result otherwise worked by state law in adoptions of non-Indians.

The right-of-intervention but no-right-to-notice netherworld produced by the Alaska Supreme Court's construction of the ICWA produces unworkable and unconscionable results for Indian tribes and Indian children nationwide. On the one extreme the decision strips tribes of the initial triggering mechanism for enforcement of fundamental tribal rights in their children conferred by

ICWA and recognized by this Court in *Holyfield*. On the other hand the ICWA in staged intervals empowers tribes and the Secretary of the Interior to learn generally of state placements and adoptions immediately following court action; and then at age 18 the Indian children themselves may acquire full specific information on the tribal identity of their biological parents and other information. The Alaska ruling in the face of ICWA's other right to information provisions extends the potential for tribal intervention to set aside void adoptions for many years and lends a sense of impermanancy to all consensual ICWA adoptions.

The recognitions gained by amicus in *Holyfield* would be phyrric if the decision below were allowed to stand; tribal right of intervention without concomittant right to notice would be meaningless. Amicus urges summary reversal; alternatively, amicus urges granting of *certiorari* review.

ARGUMENT

One year ago in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___ (1989), the Court in recognizing and upholding the broad purposes and protections of the Indian Child Welfare Act of 1978 (ICWA), 92 Stat 3069, 25 USC §§ 1901-1963, recognized at fn. 12:

> The ICWA specifically confers standing on the Indian child's tribe (as well as the child and its parents) to petition a court to invalidate any foster care placement or termination of parental rights under state law "upon a showing that such action violated any provision of sections

> 1911, 1912, and 1913" of the ICWA. See also § 1911(c) (Indian child's tribe may intervene at any point in state-court proceedings for foster care placement or termination of parental rights). "Termination of parental rights" is defined in § 1903(1)(ii) as "any action resulting in the termination of the parent-child relationship."

Despite this Court's recognition above, the Alaska Supreme Court now holds that Indian tribes are not entitled to notice of state proceedings for voluntary termination of a tribal mother's parental rights to her Indian child for ultimate adoption into a non-Indian home. Application of the result the Alaska Supreme Court's construction of ICWA would work produces a legal conundrum of bizarre consequences and should be reversed.

The Alaska Supreme Court inferentially postulates a no-tribal-right-to-notice on protecting the confidentiality interests of the biological and adopting parents in voluntary proceedings in state court. Its reliance upon the confidentiality otherwise ensured pursuant to Alaska Stat. 25.23.150, however, is simply not appropo in ICWA cases for a number of reasons.

Section 105 of the Act, 25 USC § 1915, provides, for instance:

> (e) A record of each such placement, under State law, of an Indian child shall be maintained by the State in which the placement was made, evidencing the efforts to comply with the order of preference specified in this section. Such record shall be made available at any time upon the request of the Secretary or the Indian child's tribe.

Clearly, ICWA expressly entitles tribes and the Secretary of the Interior to general knowledge of state adoptive placements and they become entitled to this information at a minimum at least immediately following state proceedings.[1]

Section 107 of the Act, 25 U.S.C. § 1917, provides furthermore that an Indian subject of an adoptive placement, upon turning eighteen, shall on application be informed by the court which entered final decree of the tribal affiliation, if any, of the individual's biological parents and of such other information as may be necessary to protect any rights flowing from the individual's tribal relationship. Thus a second mechanism has been created for acquiring awareness of adoptions and thereafter of jurisdictional defects which may have rendered the original proceeding void.[2]

In another area, Section 103, 25 USC § 1913(d), gives Indian parents two years after the entry of a final state decree of adoption to withdraw consent where obtained through fraud or duress, to petition to vacate such decree, and to have such decree vacated and the child returned.

---

[1] A tribe or the Secretary could, for instance, file a standing request pursuant to § 1915(e) with each state for records of any placement immediately upon its being reported. Undoubtedly the Secretary or at least a number of tribes will make such a filing if this case is allowed to stand.

[2] A premium might, in instances, inure to the child if the biological parent had since deceased and a substantial inheritance or simply an entitlement to Social Security death benefits might thereby arise. In some tribal affiliations, Indian claims judgments monies, per capita payments, headrights or land apportionments might also provide economic incentives.

A measure of non-finality is thereby added which is not normally present in other state adoptions.

The collective result of ICWA is, unlike other state adoptions of non-Indians, to remove from absolute secrecy the existence of the proceedings themselves and to make state adoptions more subject to being set aside under certain circumstances. Therefore, the inescapable effect under Alaska's construction would in many instances only be to postpone critical outside analysis of ostensibly concensual adoptions by parties with standing other than the natural and adoptive parents.

To read, as does the Alaska Supreme Court, that notice to the tribe is not required during the actual pendency of the adoption while the ICWA specifically confers standing on the Indian child's tribe to participate in child custody adjudications and expressly requires reportings pursuant to § 1915(e) works a cruel result, encourages multifarious litigation and disregards the need for judicial economy.

This court, paraphrasing from *In re Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz, at 204, 635 P2d, at 189, in the *Holyfield* decision, concluded "we must defer to the experience, wisdom, and compassion of the [Choctaw] tribal courts * * *." 490 US at ___.[3] Where state courts are either unable or unwilling to transfer jurisdiction to tribal forums, due process minimally requires

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[3] Vivian Holyfield's adoption petition in tribal court was granted February 9, 1990. W.J. and the twins were ordered to undergo HLA-blood typing and based on the results W.J.'s alleged paternity was absolutely disproved.

notice to tribes in order that statutory rights of intervention may be exercised.

CONCLUSION

For the reasons stated in this brief, the Mississippi Band of Choctaw Indians requests that this Court either summarily reverse the decision of the Alaska Supreme Court or vacate and remand the case for further proceedings consistent with *Mississippi Band of Choctaw Indians v. Holyfield* and Section 1911(c). Alternatively, amicus respectfully requests that Petitioners' petition for a writ of certiorari be granted.

Respectfully submitted,

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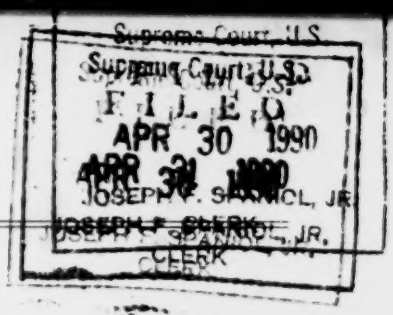
April 27, 1990



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BRIEF OF *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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INTEREST OF *AMICUS*

Amicus Curiae, the Navajo Nation, joins with Petitioners in urging the Court to grant certiorari in this case. The parties have consented to the filing of this brief as required in this Court's Rule 37. The Navajo Nation is the largest Indian Tribe, with a reservation that spans three states, and with enrolled members residing throughout the United States. Because of their numbers and the mobility of their families, children of the Navajo Nation are involved with state social service workers and state court systems on a daily basis.

The interpretation given to the Indian Child Welfare Act of 1978 (ICWA) by the Alaska Supreme Court seriously impairs the ability of tribes to exercise their rights under the ICWA. If the Alaska Supreme Court decision is allowed to stand, Navajo children found in Alaska, be they domiciliaries of the Navajo Nation or not, may be "voluntarily" placed into foster care or adoptive homes without notice to the Navajo Nation. Without knowledge of state court proceedings, the Nation will be unable to exercise its right to exclusive jurisdiction over domiciliary children, and presumptive jurisdiction over non-domiciliaries. Further, the ICWA's preference scheme for placement of Indian children with extended family members, other tribe members, and finally other Indian families cannot be adhered to without the knowledge and participation of the Navajo Nation.

The Nation fears that other states may follow Alaska's lead, reading denial of certiorari by this Court as an affirmation of Alaska's disregard of the rights of tribes.

For these reasons, the Navajo Nation respectfully requests this Court to accept certiorari, to reverse the decision of the Alaska Supreme Court, and to protect the rights of the Navajo Nation and all other tribes in their children and their future.

REASONS FOR ISSUING THE WRIT

Under the Indian Child Welfare Act of 1978 Indian tribes are entitled to notice of voluntary child custody proceedings involving Indian children as a necessary corollary to their right to intervene in "any State Court proceeding for the foster care placement of, or termination of parental rights to, an Indian child." 25 U.S.C. § 1911. The decision of the Alaska Supreme Court holding that the Cook Inlet Tribal Council had no right to notice of C.M.F.'s case and consequently had no right to intervene, is in direct conflict with the letter of the Act, the Legislative policy behind the Act, and this Court's holding in *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. ___, 109 S.Ct. 1597 (1989).

I. THE DECISION OF THE ALASKA SUPREME COURT UNDERCUTS THIS COURT'S *MISSISSIPPI CHOCTAW* DECISION BY DENYING TRIBES THE RIGHT TO NOTICE OF VOLUNTARY CHILD CUSTODY PROCEEDINGS.

A central premise of this Court's decision in *Mississippi Choctaw* was that Indian tribes have rights and interests protected by the ICWA, and that such rights cannot be defeated by the actions of individuals tribal members.

At the heart of the Act are the tribes' rights to exclusive jurisdiction over children domiciled or residing within their own reservations, and the right to exercise concurrent but "presumptively tribal" jurisdiction over non-domiciliaries. 109 S.Ct. at 1601.

Mississippi Choctaw dealt with the issue of domicile. In recognizing a uniform federal law of domicile, this Court held that a state rule of domicile that would permit parents to avoid the ICWA's jurisdictional scheme would be inconsistent with Congress' intent.[1] 109 S.Ct. 1610.

In the case now before the Court, the Alaska Supreme Court has interpreted the notice provision of § 1912 of the ICWA to preclude intervention of tribes in cases where their Indian children are voluntarily placed in foster care or given up for adoption. Pet. App. at 2a. The Alaska Court's decision can only be viewed as another assault on the jurisdictional scheme established by the ICWA, attempting once again to pit the desires of the parents in individual cases against the concerns of Tribes for stability, longevity, and the welfare of their children. For the reasons cited in *Mississippi Choctaw*, the decisions of the Alaska Supreme Court should be reversed.

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[1] The Court noted with favor the Utah Supreme Court decision *In re Adoption of Halloway*, 732 P.2d 969, 970 (Utah 1986) holding that "[state] abandonment law cannot be used to frustrate the federal legislative judgment expressed in the ICWA that the interests of the tribe in custodial decisions made with respect to Indian children are as entitled to respect as the interests of parents." *Mississippi Choctaw*, 109 S.Ct. at 1610.

II. INDIAN TRIBES ARE ENTITLED TO NOTICE OF INDIAN CHILD CUSTODY PROCEEDINGS BOTH AS SOVEREIGNS AND BECAUSE OF THE SPECIAL RELATIONSHIP THEY HAVE TO THEIR CHILDREN AS *PARENS PATRIAE*.

The decision of the Alaska Supreme Court below effectively sets the cart before the horse in construing the ICWA. Looking first to § 1912, the Court seizes upon the following language to support its position that the Tribal Council had no right to intervene:

> In any involuntary proceeding in a State court, when the court knows or has reason to know that an Indian child is involved, the party seeking foster care placement of, or termination of parental rights to, an Indian child shall notify the parent or Indian custodian and the Indian child's tribe by registered mail with return receipt requested, of the pending proceedings and of their right of intervention

25 U.S.C. § 1912(a). The Court failed to address how § 1912 could be so interpreted given the explicit right of intervention provided in § 1911(c):

> In *any* State Court proceeding for the foster care placement of, or termination of parental rights to, and Indian child, the Indian custodian of the child and the Indian child's tribe *shall have a right to intervene* at any point in the proceeding.

25 U.S.C. § 1911(c) (emphasis added).

A more coherent approach to construing the Act would be to begin with § 1911, entitled "Indian tribe jurisdiction over Indian child custody proceedings." As this Court recognized in *Mississippi Choctaw*, § 1911 lays

out the dual jurisdictional framework of the ICWA. Sections 1912 and 1913 on the other hand, establish the minimum federal standards and procedural safeguards required in involuntary and voluntary cases respectively. H.R. Rep. No. 1386 at 19, 1978 U.S. Code Cong. & Ad. News 7530, 7541. Not surprisingly, the requirements under § 1912 are more stringent. When a State moves to take custody of an Indian child § 1912 requires the state to notify the parent or Indian custodian and the child's tribe by registered mail, make counsel available to indigent parents, provide access to records and rehabilitative services. 25 U.S.C. §§ 1912(a), (b), (c) and (d). Section 1913, addressing voluntary placements, only attempts to insure that consent was freely given.

The explicit procedural right to certified mail notice mandated in involuntary cases cannot be used to limit the ICWA's broad grant of power to Indian tribes to hear and determine cases involving Indian children. The ICWA allocates power to exercise jurisdiction over Indian children between the states and Indian tribes. It is the embodiment of a federal policy that "where possible, an Indian child should remain in the Indian community", and which "seeks to protect the rights of the Indian child as an Indian and the rights of the Indian community and tribe in retaining its children in its society." H.R. Rep. No. 1386 at 23, 1978 U.S. Code Cong. & Ad. News at 7546.

The ICWA recognizes a dual role for tribes in Indian child custody proceeding. First, Indian tribes are sovereigns with the power to regulate their internal affairs and social relations. This power was judicially acknowledged in *Williams v. Lee*, 358 U.S. 217, 220 (1959), and recognition that decisions affecting Indian children are among those reserved to tribes came with this Court's

holding in *Fisher v. District Court*, 424 U.S. 382, 387-388 (1976).

The ICWA confirmed the exclusive jurisdiction of Indian tribes over children domiciled on the reservation. But Congress also expanded the rights of Indian tribes beyond those previously recognized in case law to allow tribes to exercise jurisdiction over their children wherever they may be found. In doing so the Congress specifically identified Indian children as a tribe's most valuable resource, and premised its authority to enact the ICWA on its trust responsibility for tribes and their resources. *See* 25 U.S.C. § 1901(2) and (3). It would be inconsistent with this trust responsibility to limit ICWA's protection solely to children subject to involuntary state court proceeding. Implicit in the ICWA is the requirement that state courts communicate with tribes regarding Indian foster care and termination of parental rights proceedings so that these precious resources may be preserved.

The second role for a tribe is as *parens patriae* to its children. In this regard it is like any other interested party for whom the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Even if there are reasons for a state to retain jurisdiction in a particular case, the tribe has an interest in seeing that to the fullest extent possible each Indian child will be secure in his right to his Indian heritage, to know he is an Indian and

to live in the Indian way. Acting as *parens patriae* a tribe is entitled to notice under traditional concepts of due process.

Under the Alaska Supreme Court's rationale, the twin infants at issue in *Mississippi Choctaw* could be placed for adoption without notice to the Tribe. Thus, even applying the federal law of domicile recognized by this Court in *Mississippi Choctaw*, and even though the Tribe has exclusive jurisdiction, the Tribe might never know that these children had been born and subsequently lost to the Tribe. Certainly, if the Tribe discovered the existence of these children and their unlawful removal, it could petition a Court of competent jurisdiction pursuant to § 1914 of the ICWA to set aside the adoption order for failure of jurisdiction, but at what cost to the parties involved?

There is no legal basis for withholding information on Indian child placements from the child's tribe. Section 1915(e) of the ICWA requires that each state maintain a record of all Indian child placements, and provide that information to tribes upon request. Theoretically, a diligent tribe could regularly solicit information from states where its children are likely to be found, and then exercise its rights to jurisdiction under § 1911. But surely Congress could not have intended to so burden Indian tribes in the exercise of their rights.

Rather than precluding tribes from being informed of Indian child custody proceedings, the ICWA requires that state courts provide notice to tribes so that there may be a fair and prudent apportionment of the jurisdictional powers allocated in the ICWA.

III. The *Department of Interior Guidelines* Promulgated to Assist the States in Handling Indian Child Custody Proceedings, And Relied on by the Alaska Supreme Court, Conflict With the ICWA.

One of the Congressional findings which precedes the substantive provisions of the ICWA recites that:

> [A]n alarmingly high percentage of Indian families are broken up by the removal, often unwarranted, of their children from them by nontribal public and private agencies. . . .

25 U.S.C. § 1901(4). The House Report on the ICWA identifies the Bureau of Indian Affairs (BIA) as a participant in this tragedy because of its long standing practice of sending thousands of Indian children away to boarding schools where they are raised as strangers to their families and their cultural heritage.

> The federal boarding school and dormitory programs also contribute to the destruction of Indian Family and community life.

H.R. Rep. No. 1386 at 9, 1978 U.S. Code Cong. & Ad. News at 7531. Despite the BIA's documented lack of sensitivity to the needs of Indian children, the Secretary of the Interior was charged with drafting regulations to implement the ICWA. 25 U.S.C. § 1952. The *Guidelines for State Courts; Indian Child Custody Proceedings* were published in the Federal Register by the BIA under authority delegated by the Secretary of the Interior and offer no evidence of a change in attitude. 44 Fed. Reg. 67584 (Nov. 25, 1979).

The *Guidelines* provide the foundation for the Alaska Supreme Court's holding that tribes have no right to intervene in voluntary placement cases, and are cited for

that proposition. 44 Fed. Reg. at 67586; Pet. App. at 2a. The position asserted by the BIA in the *Guidelines* has no basis in the law. Instead, the Bureau builds its house of cards on the cornerstone of confidentiality.

The *Guidelines* assert that in a parent's interest of confidentiality, tribes can be denied notice and the right to intervene in voluntary cases. 44 Fed. Reg. at 67586. The Congress in § 1915(c) recognized that there is often a desire for anonymity in adoption proceedings and provided that when a parent consents to placement the Court is required to give weight to such a desire in applying the preferences for placement. Concerns for anonymity may allow a court to bypass family members in favor of other tribal families, or other Indian families, but it does not relieve the Court of its duty to notify the child's tribe of a foster care or termination proceeding, and permit intervention upon petition. The House Report accompanying the ICWA dealt specifically with this issue in its section-by-section analysis providing that "[w]hile the request for anonymity should be given weight in determining if a preference should be applied, it is not meant to outweigh the basic right of the child as an Indian." H.R. Rep. No. 1386 at 24, 1978 U.S. Code Cong. & Ad. News at 7546.

The rationale of the *Guidelines* is seriously flawed and to the extent that it allows the wishes of a parent for anonymity to defeat a tribe's rights under ICWA it has been thoroughly discredited by this court's holding in *Mississippi Choctaw*. The *Guidelines* reflect the same misguided views that necessitated the passage of the ICWA, and should be rejected by this Court.

CONCLUSION

This Court should accept certiorari because the rights of tribes codified in the ICWA and affirmed by this Court in *Mississippi Choctaw* are in jeopardy. If the decision of the Alaska Supreme Court is allowed to stand, and the interpretation given to the ICWA by the BIA *Guidelines* is validated, a single individual will be able to defeat the interests of a tribe in exercising jurisdiction over its children and having a role in their placement by the simple expedient of denying the tribe notice. Clearly this was not the intent of Congress, but this Court's intervention is needed to insure that the biases of courts and agencies which the Act seeks to overcome are not allowed to twist and warp the language of the ICWA so as to make it their own creature.

Respectfully submitted,

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No. 89 - 1520

IN THE
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OCTOBER TERM, 1989

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PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

BRIEF AMICI CURIAE OF THE TANANA IRA NATIVE COUNCIL; QUINAULT INDIAN NATION; (additional amici on inside cover)

IN SUPPORT OF PETITIONER

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April 1990

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CONFEDERATED TRIBES OF THE COLVILLE RESERVATION;

THE KARUK TRIBE OF CALIFORNIA;

ROHNERVILLE BEAR VALLEY WIYOT RANCHERIA OF CALIFORNIA

No. 89 - 1520

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

COOK INLET TRIBAL COUNCIL,
C.A.A. AND C.M.F.,
A TRIBAL INDIAN MOTHER
AND HER MINOR CHILD
PETITIONERS,

V.

CATHOLIC SOCIAL SERVICES, INC.,
C.G. AND S.G.
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI
TO THE ALASKA SUPREME COURT

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INTEREST OF THE AMICI CURIAE

Amici curiae are federally recognized Indian tribes from the State of Alaska and other states. Amici have substantial interests in preventing their state courts from following the precedent established by the Alaska Supreme Court in this case. Alaska tribal amici have a particular interest in the resolution of the issues before this Court since the decision of the Alaska Supreme Court has an immediate and adverse impact upon those tribes' rights under the Indian Child Welfare Act (hereinafter the ICWA or the Act).

The Alaska Supreme Court decision at once denies tribes the right to intervene and the right to notice in voluntary proceedings. This holding is patently inconsistent with the plain language of the ICWA which grants Indian tribes the express right to intervene in any state court proceeding resulting in the termination of parental rights to an

Indian child, whether or not the parent has consented to the termination. And although the ICWA does not expressly grant tribes the right to receive notice of voluntary termination proceedings, that right is, by force of due process principles, a concomitant right to the right to intervene in voluntary proceedings.

Furthermore, the decision below creates a loophole in the ICWA which significantly undermines the Act's purposes. The decision will allow those determined to avoid tribal participation in voluntary termination proceedings to shop for a state forum where tribal intervention and notice to tribes is not required. This practice defeats a uniform application of the ICWA and frustrates the efforts of states who implement the Act by providing for tribal intervention and notice in both voluntary and involuntary proceedings.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE DECISION BELOW TO CORRECT THE ALASKA SUPREME COURT'S MISCONSTRUCTION OF THE PLAIN LANGUAGE OF THE INDIAN CHILD WELFARE ACT.

A. The Alaska Supreme Court Erred in Holding That Indian Tribes Do Not Have a Right of Intervention in Voluntary Termination Proceedings.

In the case at bar, Catholic Social Services, Inc. v. C.A.A., 783 P.2d 1159, 1160 (Alaska 1989), the Alaska Supreme Court found that "Congress explicitly granted intervention rights to tribes in involuntary termination proceedings but did not do so in voluntary termination proceedings." This finding of no right to intervene in voluntary termination proceedings is a glaring misconstruction of the plain language of the Indian Child Welfare Act. Based on this erroneous construction, the Alaska court further held that the Tribe had no right to notice in voluntary proceedings. This Court should accept review of the decision below in order to correct this blatant error.

The ICWA provides in pertinent part that, "[i]n any State court proceeding for the . . . termination of parental rights to, an Indian child . . . the Indian child's tribe shall have the right to intervene at any point in the proceeding." 25 U.S.C. § 1911(c) (emphasis added). The Act defines "termination of parental rights" to mean "any action resulting in the termination of the parent-child relationship." 25 U.S.C. § 1903 (1)(ii). Thus, by its plain language, the Act grants tribes the right to intervene in any proceeding for the termination of parental rights, whether voluntary or involuntary in nature.[1]

In the instant case, the trial court agreed with this construction of the Act's terms and set aside the Indian mother's voluntary relinquishment of her parental rights, which had resulted in a "termination

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[1] There is no language in the Act which restricts the Tribe's right to intervene solely to involuntary proceedings.

of the parent-child relationship", for failure to provide notice to the Tribe.[2] However, the Alaska Supreme Court rejected the trial court's finding and, having erroneously concluded that the Tribe had no right to intervene, the Court further determined that the Tribe was not entitled to notice in voluntary proceedings. Catholic Social Services, 783 P.2d at 1160.[3] The

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[2]This Brief adopts and incorporates the Petitioners' Petition for a Writ of Certiorari. The facts referred to herein are set forth in the Statement of the Case, Pet. Brief at 2-8.

[3] The provision in the Bureau of Indian Affairs' interpretive guidelines, relied upon by the Alaska Supreme Court, does not support the court's decision that there is no right to intervene in voluntary proceedings. The BIA provision merely paraphrases the language of the Act which mandates both intervention and notice in involuntary proceedings. That provision is not inconsistent with the position that the ICWA grants to tribes the right to intervene in voluntary as well as involuntary proceedings.

Whether the Alaska Supreme Court would have held that notice is required if it had properly construed the ICWA to grant the right to intervene in voluntary proceedings is unknown. Interestingly, however, the Alaska Supreme Court has recognized that the interests of grandparents in the ICWA'S

per curium opinion never discussed or even cited to § 1911(c) of the Act which explicitly provides for intervention by the Tribe in any proceeding.

Moreover, the Alaska Supreme Court's decision significantly frustrates the purposes of the ICWA, which was enacted to remedy the devastating impact on tribes of the massive removal of their children and subsequent placement into non-Indian homes. See H.R. Rep. No. 1386, 95th Cong., 2d Sess. reprinted in 1978 U.S. Code Cong. & Admin. News 7530-31 (hereinafter House Report). The Act is intended to ensure a tribal role in all Indian child custody proceedings for the purpose of promoting "the stability and

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placement preference give rise to due process protection. E.A. v. State, 523 P.2d 1210, 1215 (Alaska 1981). And in that case, the court held that "[i]n order that the grandparents may effectively assert their statutory right to preference at [adoptive] proceedings, we further hold that they have a due process right to notice and an opportunity to be heard . . . . " Id. at 1215-1216.

security of Indian tribes and families . . . . " 25 U.S.C. § 1902. This purpose is severely undermined by the Alaska Supreme Court's decision because it denies tribes the right to intervene in voluntary termination proceedings. This decision is clearly inconsistent with both the language of the Act and its congressional intent.

Indeed, this Court has recognized that Congress intended the ICWA to "reach voluntary as well as involuntary removal of Indian children . . . ." Mississippi Band of Choctaw Indians v. Holyfield, 490 U.S. ____, 108 S.Ct. 1597, 104 L.Ed.2d 29, 48 n. 25 (1989) (hereinafter Holyfield). The Court in Holyfield also acknowledged that the substantive provisions of the Act were not restricted to involuntary removal of Indian children, but also extend "in cases where the parents consented to an adoption, because of the concerns going beyond the wishes of

individual parents." Id. at 47 - 48 (emphasis added).[4]

If there is any doubt whether the ICWA grants tribes the right to intervene in voluntary proceedings, the Act should be liberally construed to effect Congress's intent to promote the stability and security of Indian tribes and families. Abbott Laboratories v. Portland Retail Druggists Ass'n, 425 U.S. 1, 12 (1976). Furthermore, as this Court has found, federal laws dealing specifically with Indian affairs are liberally construed in favor of preserving Indian rights. Choctaw Nation v. United States, 318 U.S. 423, 431-31 (1943). These principles of statutory construction mandate interpreting the ICWA to grant tribes the right to intervene in voluntary termiantion proceedings.

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[4]The substantive provisions are listed in Holyfield and include the Tribe's right to intervene. Id.

B. The Tribe's Right to Intervene to Protect the Tribal Membership of its Children is an Interest Entitled to Due Process Protections Including the Right to Notice.

1. The Tribe's right to intervene is an interest protected by the Due Process Clause.

The Tribe's right to intervene in state proceedings involving their children is protected by principles of due process. As this Court stated in Board of Regents v. Roth, 408 U.S. 564, 569 (1972): "The requirements of the procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property."[5] In Roth the Supreme Court set out the test for identifying a protected property interest:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must instead, have a legitimate claim of entitlement

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[5]U.S. Const. Amend. XIV § 1 declares: "No State shall . . . deprive any person of life, liberty or property, without due process of law . . . ."

> to it. It is the purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

408 U.S. at 577. As discussed below, the Tribe's interest in protecting its tribal membership and, in particular, the membership interests of its children, meets the Roth test and therefore is entitled to treatment as a property interest protected by constitutional due process.

This Court has long and consistently recognized that one of an Indian tribe's most basic rights is its authority as a "distinct, independent political communit[y]", "to define its own membership for tribal purposes." Santa Clara Pueblo v. Martinez, 436 U.S. 49, 72 n. 32 (1978). Accord United States v. Wheeler, 435 U.S. 313, 327 n. 18 (1978); Cherokee Intermarriage Cases, 203 U.S. 76 (1906). It is undeniable that tribes rely upon their children for their vitality and for their continued ability to exist as

distinct political communities. As Congress recognized in enacting the ICWA, "there is no resource that is more vital to the continued existence and integrity of Indian tribes than their children." § 1901(3). As this Court has further recognized, one of the fundamental purposes of the ICWA is to strengthen and expand tribes' power to protect this critical interest:

> The protection of [the tribe's ability to assert its interest in its children] is at the core of the ICWA, which recognizes that the tribe has an interest in the child which is distinct from but on a parity with the interest of the parents . . . .

Holyfield, 104 L.Ed.2d at 49, citing In re Adoption of Halloway, 732 P.2d 962, 969-970 (1986) (emphasis added). Hence, the ICWA empowers tribes to assert their interests in their children in state forums on a parity with the natural parents.

This Court previously has established that the parent-child relationship is entitled to due process protection. In

Santosky v. Kramer, 455 U.S. 745 (1982), the Court expressly resolved that "state intervention to terminate the relationship between [a parent] and [the] child must be accomplished by procedures meeting the requisites of the Due Process Clause." Id. at 753, citing Lassiter v. Department of Social Services, 1452 U.S. 18, 37 (1981). See also Stanley v. Illinois, 405 U.S. 645, 651 (1972), quoting May v. Anderson, 345 U.S. 528, 533 (1953) (The right to raise one's children is "far more precious . . . than property rights.") (emphasis added).

Since the ICWA recognizes that the Tribe's interest in protecting the tribal-child relationship is "on a parity" with the parental interest in protecting the parent-child relationship, the tribal interest, like the parental interest, is entitled to due

process protection.[6] As we discuss next, the right to notice, under principles of due process, is a concomitant right to the tribal right to intervene in voluntary termination proceedings, notwithstanding the lack of express language in the ICWA granting a right to notice in such proceedings.

2. Notice is required under Due Process principles to protect essential Tribal interests.

In order for tribes effectively to assert their statutory rights to intervene to protect their interests in the membership of children, tribes must be afforded the due process right to notice and an opportunity to be heard.

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[6]The Tribe's interest in asserting its rights under the ICWA is as important as other interests this Court has recognized as protectable property interests. Some of these recognized protected property interests include continued welfare benefits, Goldberg v. Kelley, 397 U.S 254 (1970); unemployment compensation, Sherbert v. Verner, 374 U.S 398 (1963); and school attendance, Gross v. Lopez, 419 U.S. 565 (1975).

This Court has determined that "an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950) (citations omitted). Notice is particularly important in effectuating the tribal right to intervene in ICWA proceedings in state forums because of the inherent antagonism between tribes and states in the area of social services. The legislative history of the ICWA demonstrates Congress's appreciation of this situation and notes that "the conflict between Indian and non-Indian social systems operates to defeat due process." House Report at 7535.

In ICWA cases, due process principles safeguard both the parental and the tribal

interests against arbitrary deprivation. Therefore, if the Act's intervention provision is to have any meaning at all, the concomitant right to notice should be applied to protect the tribal interests in both voluntary and involuntary proceedings under the ICWA.

Moreover, the burden of such a notice requirement is minimal compared to the serious risk of depriving the Tribe an opportunity to participate in a fair hearing. All that is required is that a simple letter be mailed to the child's tribe. Certainly, these procedures do not place an undue burden on the state to comply with due process.[7]

II. THE ALASKA DECISION THREATENS A UNIFORM APPLICATION OF THE INDIAN CHILD WELFARE ACT.

In the Holyfield decision, this Court repeatedly noted the importance of a uniform

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[7]Currently, several states require notice in voluntary as well as involuntary proceedings. See discussion infra at p.17-18.

application of the ICWA. 104 L.Ed.2d 43-46 ("[F]ederal statutes are generally intended to have a uniform nationwide application . . . ."). The Holyfield case involved a tribal member's attempt to circumvent the ICWA by deliberately choosing a state forum that construed the Act's domicile provisions such that the Act would not apply to the tribal member's situation. In rejecting the notion that states are free to interpret the ICWA's domicile provisions differently, the Court sought to eliminate a loophole that would have allowed individuals to evade the precepts of the ICWA merely by transporting their children across jurisdictional lines. As this Court reasoned:

> [T]ribal jurisdiction under [the Act] was not meant to be defeated by the actions of individual members of the tribe for Congress was concerned not solely about the interests of Indian children and families, but also about the impact on the tribes themselves of the large numbers of Indian children adopted by non-Indians.

Id. at 47.

In the instant case, the Alaska decision creates a similar threat to a uniform application of the ICWA. Under the Alaska precedent, a social services agency or an Indian parent, whose child is subject to the ICWA, could avoid the reach of the Act by transporting the child to a jurisdiction which does not require notice to tribes in voluntary proceedings. In that instance, a termination of parental rights or an adoption could take place without the tribe even knowing of it. Such a result is clearly contrary to the purposes of the Act of promoting extensive tribal participation in all phases of ICWA proceedings.

Unlike Alaska, several states have either enacted statutes requiring notice to tribes of voluntary Indian child custody proceedings or have construed the ICWA to require such notice. For example, the Minnesota Indian Family Preservation Act requires that, "[w]hen an Indian child is

voluntarily placed in foster care, the local service agency involved in the decision to place the child shall give notice of the placement to the child's parents, tribal social service agency, and the Indian custodian within seven days of placement." Minn. Stat. § 257.353 (1989). See also Mich. Court Rules 5.980 (A)(2) (1989); Wash. Rev. Code § 26.33.09 (2) (1989). The State of Idaho has an Indian Child Welfare Agreement with the Coeur d'Alene Tribe which specifically requires that the Tribe receive "complete information" of all child custody proceedings.

Thus, as in Holyfield, there is a dire need for the Court to ensure a uniform application of the ICWA's intervention and notice provisions.

CONCLUSION

In light of the Alaska Supreme Court's misconstruction of the plain language of the ICWA and its resulting denial of the due process right of notice to tribes of voluntary termination proceedings, and in light of the need for a uniform application of the ICWA, this Court should grant the petition for certiorari and reverse the Alaska Supreme Court's decision.

Respectfully Submitted,

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